Nov 22 1869

Submitted

Jno. Clifford

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~243.~~ 58 —

WILLIAM H. FIELD, PLAINTIFF IN ERROR,

vs.

WILLIAM M. FARRINGTON AND HENRY B. HOWELL, PARTNERS, AS FARRINGTON & HOWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

a

Error

~~Affirmed~~ — Clerk's

Fees Stamp —

FILED JULY 22, 1869.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between William M. Farrington and Henry B. Howell, partners, under the firm name of Farrington & Howell, plaintiffs, and William H. Feild, defendant, a manifest error hath happened to the great damage of the said William H. Feild, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Samuel P. Chase, Chief Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-second.

[SEAL.] CHAS. P. REDMOND,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by

HENRY C. CALDWELL, *Dist. Judge.*

[Over.]

2 The execution of this writ of error appears by the schedule hereto annexed.

Attest:

CHAS. P. REDMOND,
Clerk U. S. Circuit Court East. Dist. Ark.

OCTOBER 2, 1868.

(Indorsed:) William H. Feild v. Farrington & Howell. Writ of error.

Filed May 5, 1868.

CHAS. P. REDMOND, *Clerk.*

3 Be it remembered that on the twenty-fourth day of January, A. D. 1867, came into the clerk's office of the circuit court of the United States for the eastern district of Arkansas, Garland and Nash, attorneys for Farrington and Howell, and filed therein their declaration, which is in the words and figures following, to wit:

Circuit court of U. S., &c., for the eastern dist. of Arkansas.—April term, A. D. 1867.

William M. Farrington and Henry B. Howell, partners in trade, under the name & style of Farrington & Howell, citizens and residents

of the State of Tennessee, plaintiffs in this suit, by attorney, complain of William H. Feild, defendant, a citizen and resident of the State of Arkansas, in said eastern district, in an action of assumpsit—

For that said defendant, on the first day of January, A. D. 1867, at, to wit, the said eastern district of Arkansas, was indebted to said plaintiffs in the sum of six thousand six hundred and ninety-five dollars and seventy-four cents ($6,695 74), lawful money of the United States, for the work and labor, care and diligence, of the said plaintiffs, by
4 the said plaintiffs and their agents and servants, before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at the special instance and request of the said defendant; and also for divers materials and other necessary things by said plaintiffs found, provided, used, and applied in and about that work, and at the special instance and request of said defendant; and being so indebted to said plaintiffs, said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised plaintiffs, well and truly to pay them the said sum of money last mentioned, whe he, said defendant, should be thereunto afterward requested.

And for that said defendant afterward, to wit, on the same day and year, and at the place aforesaid, was indebted to said plaintiffs in the sum of six thousand six hundred and ninety-five dollars and seventy-five cents ($6,695 74), of like lawful money as aforesaid, for divers goods, wares, and merchandise by said plaintiffs before that time sold and delivered to the said defendant, and at the like request of the said defendant.

And in the further sum of six thousand six hundred and nine-
5 ty-five dollars and seventy-four cents ($6,695 74), of like lawful money as aforesaid, for so much money before that time lent and advanced by said plaintiffs to defendant, and at the like request of defendant, and for other money by said plaintiffs before that time laid out, paid, and expended, for said defendant, at the like request of said defendant, and for other money by the said defendant before that time had and received, to and for the use of said plaintiffs; and, being so indebted, said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto them the said several sums of money in this court mentioned, when he, said defendant, should be thereunto requested.

And whereas also the said defendant afterward, to wit, on the same day and year, and at the same place aforesaid, accounted together with said plaintiffs of and concerning divers other sums of money before that time due and owing from the defendant to the plaintiffs, and then and there being in arrear and unpaid; and upon such accounting, the defendant then and there was found to be in arrear and indebted to plaint-
6 iffs in the further sum of six thousand six hundred and ninety-five dollars and seventy-four cents ($6,695 74), of like lawful money as aforesaid, and being so found in arrear and indebted to said plaintiffs, the defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the same place aforesaid, undertook, and then and there faithfully promised, to pay to said plaintiffs the said sum of money last mentioned, when he, said defendant, should be thereunto afterward requested.

Nevertheless, said defendant, although often requested, has not yet paid the said several sums of money above mentioned, or any or either

of them, or any part thereof, to said plaintiffs, but to pay the same, or any part thereof, to said plaintiffs, or to any one else for them, said defendant has hitherto altogether refused, and still refuses, to the damage of said plaintiffs ten thousand dollars; and therefore they sue.

GARLAND & NASH,
Att'ys for Pl'ffs.

I acknowledge myself security for all the costs that may accrue in this suit. Witness my hand and seal this January 23d, 1867.
Little Rock, Ark.

A. H. GARLAND. [SEAL.]

Filed, and writ issued, January 24, 1867.
CHAS. P. REDMOND, *Clk.*

7 And thereupon, on the same day, the clerk of said court issued to the marshal for said district a writ of summons, which is in the words and figures following, to wit:

8

9 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the marshal for the eastern district of Arkansas, greeting:

You are hereby commanded to summon William H. Feild, a citizen of the eastern district of Arkansas, defendant herein, if he be found within your district, to appear before the judges of our circuit court of the United States, in and for the eastern district of Arkansas, at the United States court-room in the city of Little Rock, on the first day of our next first term, 1867, to answer William M. Farrington and Henry B. Howell, partners, under the firm name and style of Farrington & Howell, citizens of the State of Tennessee, and plaintiffs herein, in an action of assumpsit to the damage of said plaintiff of ten thousand dollars.

And have you then and there this writ, with the manner of execution hereof indorsed hereon.

In testimony whereof, Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, has caused the seal of said [SEAL.] circuit court to be hereunto affixed this 24th day of January, A. D. 1867, and in the ninety-first year of our independence.
Attest: CHAS. P. REDMOND, *Clerk.*

10 Which writ is indorsed as follows:

No. 155. U. S. circuit court, eastern district of Arkansas. Farrington & Howell vs. William H. Feild. Summons. Issued January 24, 1867. Returnable April 8, 1867. Damages, $10,000^{00}$.

Returned and filed 26 Jan'y, 1867.
CHAS. P. REDMOND, *Clerk.*

Garland & Nash, plaintiff's attorney.

11 On which writ the marshal makes return as follows, to wit:

In obedience to the within writ, I have summoned the within-named William H. Feild by reading the same to him in his presence and hearing, Little Rock, in the eastern district of Arkansas, on this 25th day of January, A. D. 1867.

ISAAC C. MILLS,
U. S. Marshal for Eastern District of Arkansas.

Fees	2 00
Return	25
	$2 25

12

13 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that, at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the eighth day of April, anno Domini one thousand eight hundred and sixty-seven, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD.

And now comes said defendant, by Watkins & Rose, his attorneys, and files herein his prayer for a bill of particulars. And come also said plaintiffs, by Garland & Nash, their attorneys, and move the court for an order to open and publish the depositions in this case; and it is accordingly ordered that the clerk open and publish the depositions in this cause.

Which prayer for bill of particulars is in the words and figures following, to wit:

14 In U. S. circuit court, eastern district of Arkansas.—April term, A. D. 1867.

FARRINGTON & HOWELL, PLAINTIFFS,
vs.
WILLIAM H. FEILD, DEFENDANT. } Assumpsit.

Comes said defendant by attorney, and craves oyer of the bill of particulars of demand in said plaintiffs' declaration mentioned.

WATKINS & ROSE, *Att'ys.*

Filed April 8, 1867.

CHAS. P. REDMOND, *Clerk.*

On April ninth, A. D. 1867, as follows:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD.

And now come said plaintiffs, by Garland & Nash, their attorneys, and grant oyer by filing bill of particulars.

15 Which bill of particulars is in the words and figures following, to wit:

W. H. Feild in ac. with Farrington & Howell.

		DR.		
1865.				
Octo. 13.	To cash as per y'r receipt		$11,000	
1866.				
Sept. 15.	" interest on $11,000, 11 mos	$605		
	Freight & drayage, river insurance, $282 50, 11 mos	15 51		
			620 51	
				11,620 51

1866.	Cr.	
Sept. 15.	By sales 47 bales of cotton	4,924 77
	Balance due F. H.	6,695 74

MEMPHIS, TENN., *September 15th*, 1866.

A true copy of
Filed April 9th, 1867.

CHAS. P. REDMOND, *Clerk.*

On April 29th, A. D. 1867, as follows:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD. } Assumpsit.

16 And now comes said defendant, by Watkins & Rose, his attorneys, and files herein the deposition of McLefresh.

And on May 1st, A. D. 1867, as follows:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD. } Assumpsit.

And now comes said defendant, by Watkins & Rose, his attorneys, and files herein his plea of recoupment.

Which plea of recoupment is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Arkansas.—Of the April term, 1867.

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD. } Assumpsit.

Comes the said defendant, by his attorneys, and for a second and further plea in this behalf he says, actio non, because he says that heretofore, to wit, on the 1st day of October, 1865, in the eastern dis-
17 trict of Arkansas aforesaid, he shipped to the said plaintiffs a large quantity of goods and chattels and merchandize, to wit, forty-seven bales of cotton, of great value, to wit, of the value of fifteen thousand dollars, which said cotton the said plaintiffs then and there agreed to sell for the said defendant within a reasonable time, or upon the order of the said defendant, and that it was upon the faith of the said cotton that plaintiffs advanced the said moneys in said declaration mentioned; and by agreement between the said plaintiffs and the said defendant the proceeds of the sales of the said cotton were to be applied by the said plaintiffs to the repayment of the said moneys advanced as aforesaid by the said plaintiffs; and the said defendant, in fact, saith that the said plaintiffs would not and did not sell the said cotton within a reasonable time, though requested by the defendant so to do, but that the plaintiffs held and retained the said cotton for a long space of time, to wit, for the space of nine months, and sold the same when the said cotton had become and was greatly depreciated in the market. Wherefore the defendant saith that he is greatly damaged by the said default
18 of the plaintiffs in failing and refusing to sell the said cotton within a reasonable time after the same had been received by the plaintiffs, and after the request of the defendant as aforesaid, to wit, in the sum of ten thousand dollars, and this he is ready to verify. Wherefore the defendant prays that he may be allowed to recoup the damages by him sustained, as aforesaid, against any damages which the plaintiffs

may have sustained by reason of the failure of the defendant to comply with the assumpsits in said declaration sustained.

WATKINS & ROSE, *of Counsel for Defendant.*

Filed May 1st, 1867.

CHAS. P. REDMOND, *Clerk.*

And on May 2d, A. D. 1867, as follows:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD. } Assumpsit.

And now come said plaintiffs, by Garland & Nash, and Gallagher & Newton, their attorneys, and file herein their motion to strike
19 additional plea of defendant from the files; and comes the defendant, by Watkins & Rose, his attorneys; and the parties hereto make and file herein their written agreement for the continuance of this cause to the adjourned term in October next, and waiving all objections to depositions on file, except for competency.

Which motion to strike is in the words and figures following, to wit:

FARRINGTON & HOWELL, PL'FFS,
vs.
WILLIAM H. FEILD, DEF'T.

In the circuit court of the United States for the eastern district of Arkansas.—April term, A. D. 1867.

And the said plaintiffs, by attorney, come and move the court to strike from the files the further and additional plea heretofore filed by defendant herein, upon the following grounds, viz:

1st. Said plea was filed after the said cause was called regularly for trial, and after the lapse of the time allowed by the court to file pleas in a cause.

2d. Said plea presents no issue or defense to the action; and
20 3d. Because if the matters and facts in said plea set forth and contained are a sufficient answer to said plaintiff's declaration, the same could be given in evidence under the general issue filed in this cause in behalf of defendant Wherefore, plaintiffs move, &c.

GARLAND & NASH, &
GALLAGHER & NEWTON,
Att'ys for Pl'ffs.

Filed May 2, 1867.

CHAS. P. REDMOND, *Cl'k.*

And which agreement for continuance is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Arkansas.—Of the April term, 1867.

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD.

We agree that this case may stand continued until October next, and all objections to depositions on file are waived, except for competency.

21

WATKINS & ROSE, *for Def't.*
GARLAND & NASH, &
GALLAGHER & NEWTON,
Att'ys for Pl'ffs.

Filed May 2, 1867.

CHAS. P. REDMOND, *Clerk.*

And on the same day the plaintiffs, by attorney, filed a notice, which is in the words and figures following, to wit:

LITTLE ROCK, ARK'S,
May 2d, A. D. 1867.

Mr. WILLIAM H. FEILD:

SIR: You are hereby notified to produce in court to-day, to wit, in the circuit court of the United States for the eastern district of Arkansas, to be used as evidence on the part of the plaintiffs on the trial of a certain cause therein pending wherein we, Farrington and Howell, are plaintiffs, and you are defendant, the originals of two several letters or written communications bearing date, the one November 16th, A. D. 1865, at Memphis, Tennessee, and the other bearing date the 8th
22 day of August, A. D. 1866, at Memphis, Tennessee, written, addressed, and sent by the United States mail by us the days of their several dates to you, at your address at Little Rock, Arkansas, and in relation to the disposition of forty-seven bales of cotton to be made by us for you, and which bales of cotton had been consigned to us as factors and commission merchants for disposition under your instructions.

We remain, very respectfully, your ob't serv'ts,
FARRINGTON & HOWELL, *Pl'ffs*,
By GARLAND & NASH, &
GALLAGHER & NEWTON, *their Att'ys.*

Returned & filed May 2, 1867.
CHAS. P. REDMOND, *Cl'k.*

And on October 19th, A. D. 1867, as follows:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD. } Assumpsit.

And now come the parties by their respective attorneys, Garland & Nash, for plaintiffs, and Watkins & Rose, for defendant, and by agreement this cause is continued.

23 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that, at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the thirteenth day of April, anno Domini one thousand eight hundred and sixty-eight, at the United States court-room in the city of Little Rock, Arkansas, the Honorable Samuel F. Miller, judge of the Supreme Court of the United States, assigned to this circuit, presiding, & Hon. Henry C. Caldwell, district judge, holding said court, the following proceedings were had, to wit:

And on April 29th, A. D. 1868, as follows:

FARRINGTON & HOWELL
vs.
WILLIAM H. FEILD. } Assumpsit.

And now come the plaintiffs, by attorneys Gallagher & Newton, and Garland & Nash, and comes defendant, by Watkins & Rose, his attorneys; and, both parties announcing themselves ready for trial a jury

came, to wit: Lucien B. Hardin, Leander S. Dunscomb, John Clifford, Robert Goar, Lafayette M. Harris, Albert Adams, Thomas Jones, James M. Vance, Alexander Robertson, Avery S. Mustain, Henry Linde, and Gamaliel Z. Adams, who were duly sworn well and truly to try the issue joined in this cause, and a true verdict to render, according to
24 their evidence; and the jury having heard the evidence, and argument of counsel as well on part of the plaintiffs as of the defendant, and being charged and instructed by the court, retired to consult of their verdict.

And on April 30th, A. D. 1868, as follows:

FARRINGTON & HOWELL *vs.* WILLIAM H. FEILD. } Assumpsit.

And now this cause having been heretofore submitted to a jury, come the plaintiffs, by Garland & Nash, their attorneys, and comes the defendant, by Watkins & Rose, his attorneys, and come the jury, to wit: Lucien B. Hardin, Leander S. Dunscomb, John Clifford, Robert Goar, Lafayette M. Harris, Albert Adams, Thomas Jones, James M. Vance, Alexander Robertson, Avery S. Mustain, Henry Linde, and Gamaliel Z. Adams, and return into court their verdict as follows, to wit:

"We, the jury, find for the plaintiffs, and assess their damages at five thousand six hundred and ninety and twenty-four-one-hundredths dollars ($5,690 24).

"JAMES M. VANCE, *Foreman.*"

25 It is therefore ordered, considered, and adjudged, that said plaintiffs, William M. Farrington and Henry B. Howell, partners as aforesaid, do have and recover of and from said defendant, William H. Feild, the sum of five thousand six hundred and ninety dollars and twenty-four cents ($5,690 24) for their damages, together with all their costs in and about this suit expended, and have execution therefor.

And on May 5th, A. D. 1868, as follows:

FARRINGTON & HOWELL *vs.* WILLIAM H. FEILD. } Assumpsit.

And now comes said defendant, by Watkins & Rose, his attorneys, and tenders to the court his bill of exceptions herein, which is examined, approved, and signed, and sealed by the court, and ordered to be made a part of the record in this cause; and also files a copy of the writ of error in this cause for the plaintiffs; and also his supersedeas bond, which is examined and approved by the court; and it is ordered and considered that all process on the judgment in this cause be super-
26 ceded until the further order of the court in the premises.

Which bill of exceptions is in the words and figures following, to wit:

United States circuit court, eastern district of Arkansas.—April term, 1868.

FARRINGTON & HOWELL, PL'FFS, *vs.* WILLIAM H. FEILD, DEF'T. } Assumpsit.

On this 29th April, 1868, this cause came on for trial; and the jury being empannelled and sworn, the plaintiffs read to the jury the following depositions taken in this behalf:

I know the plaintiffs to this suit, but I do not know the defendants. From June 19th, 1865, till September 20, 1866, I was employed by Farrington & Howell as cotton-warehouse clerk, and since September 20, 1866, till the present time, and am still employed by Farrington & Howwell as their book-keeper. The forty-seven bales of cotton mentioned in the bills of lading, marked Exhibit No. 8 & Exhibit No. 9 to the deposition of William M. Farrington in this case, were received on the 10th of October, 1865, by me as cotton-shed clerk in Farrington &
27 Howell cotton warehouse. The marks on the cotton agreed with the marks in the bills of lading, and the cotton remained there, that is, in the cotton warehouse aforesaid, up to the time it was sold to J. B. Starke, broker for James Brown. The said sale was negotiated on the 12th September, 1866, and was completed on 15th September, 1866, when the cotton was paid for and delivered. The account of sales, of which Exhibit 6 to the deposition of William M. Farrington, before referred to, is a true copy, was rendered to the defendant on the 17th day of September, 1866. The account of sales was sent to the defendant by mail at Little Rock, Arkansas. I attended to the weighing of the cotton, and watched the examination of it by the purchaser. The account of sales shows the true weight of cotton, and the weights by which the purchaser settled. I knew the price the purchaser agreed to pay for the cotton; the agreement was that the purchaser should pay 30 cents per pound for forty-four bales, and 25 cents per pound for three bales, but the contract was made subject to examination by the purchaser before payment, as all sales of cotton in this market are. Upon examination several of the bales were found to be mixed, repacked, and old, damaged, and a majority of the bales had cotton-seed scattered
28 through them. After the purchaser had ascertained the condition of the cotton, he reported the facts to the office of Farrington & Howell, and demanded a reduction on fourteen bales of the cotton from the price agreed on. To effect a sale a reduction of five cents per pound on fourteen bales was finally allowed, and then the sales stood thus: 33 bales at 30 cents per pound, and 11 bales at 25 cents per pound, and 3 bales at 20 cents per pound. This is a statement of sales as shown by the account of sales before referred to. The cotton was in the same condition when sold as it was in when received, having been stored in a dry warehouse all the time; the cotton received no injury while in the warehouse. The true character of the cotton, as described above, could not be discovered till the bales were bored and examined.

I was acquainted with the prices of cotton in this market at the time of the sale of the cotton above-mentioned, and I consider that the said cotton was well sold; the reduction was necessary and proper on the fourteen bales, and such as the purchaser had a right to demand. The returns of the cotton, as shown by the account of sales, are all that could have been realized from the cotton in this market at that time. The items of charges and expenses, as enumerated in the account of sales, are
29 correct, and such as are customary in this city and were at that time. The repairs were rendered necessary on account of the condition of the cotton when it was received; many ropes being off, and the heads of the bales being out, and in all cases it is necessary for the seller of cotton to put the bales in good order before the cotton is paid for and received by the purchaser. The net proceeds of the cotton were placed to the credit of the defendant, on the books of the plaintiffs, as is shown by Exhibit No. 7 to the deposition of William M. Farrington before referred to. The said Exhibit No. 7 was taken by me from the books of the plaintiffs, and the balance shown to be due the plaintiffs

is the true balance as shown by the plaintiffs' books; shortly after the conclusion of the sale of the cotton, a person representing himself to be the brother and agent of the defendant, in respect to the cotton, came into the office of the plaintiffs, and said that, shortly before he had left Little Rock, the defendant had received advices of the sale of the cotton, but had not received an account of sales; this person said that his brother, the defendant, instructed him to call and inquire about the cotton, and asked to see the cotton, and said he had himself marked some of the bales, and would readily recognise them. He was told by Mr. Farrington,
30 one of the plaintiffs, that the cotton had been sold and delivered to the purchaser, and had probably been shipped, but that he would send down and see if the cotton had been shipped by Mr. Farrington's direction. I went to Mr. Brown, the purchaser, and learned that the cotton had been shipped. When I repeated this to the person representing himself as the brother of the defendant, he said that he was going to Boston, and wished to learn the house the cotton was shipped to, and that he would see it there. The conversation between this man and Mr. Farrington was such as indicated that the sale was not satisfactory to the defendant; whereupon Mr. Farrington proposed to him to repurchase cotton corresponding with the samples of the defendant's cotton, and place it subject to the defendant's order if he would pay the balance due the plaintiffs, which he declined doing.

LORENZO S. LAKE.

I am a member of the firm of Farrington & Howell, merchants of Memphis, Tennessee, who are the plaintiffs in this suit. On or about 9th Oct., 1865, we received forty-seven (47) bales cotton from W. H. Feild, of Little Rock, Ark's, the defendant; at the time the cot-
31 ton was received, Mr. Feild was in Memphis, perhaps came on the same boat with the cotton, and directed it to be put on the market, but he went to the country, and telegraphed us from Moscow, 10th Oct., as follows:

"Do not sell my cotton 'til I see you." The dispatch is herewith filed, marked Exhibit No. 1, and asked to be taken as a part of this deposition. The dispatch is signed A. Feild; but when Mr. W. H. Feild returned I showed it to him, and he acknowledged it to be his. The market was excited, and cotton, on the day of Mr. Feild's despatch, was higher than the day of its receipt. He returned to this city from the country, and was on his way to the eastern cities for the purpose, as I now recollect, to buy goods, and wanted all the money he could get; at his request we advanced him eleven thousand dollars in cash. He left the cotton to be sold at our discretion, but expressed great confidence in high prices being maintained. My recollection now is, he said he would have other cotton coming to us on his account, and went with me to see several insurance men as to the rate of premium on cotton shipped out of the Arkansas River. Several weeks afterwards he returned here from his trip to the eastern cities, on his way home, and
32 approved of our course in not selling his cotton; and said he would appreciate and remember it in the future. I do not think the market was so active, nor prices as high, as when Mr. Feild got the eleven thousand dollars from us.

We received no letter from Mr. Feild after he got the money from us, altho' we wrote him, Nov. 16th, 1865, requesting an answer. We stated we had held his cotton to meet his views, and the declining tendency of the market induced us to write him. A copy of this letter is herewith filed, marked Exhibit No. [No.] 2, and asked to be made a part of my

deposition. I will also state that we received no remittance of money or shipments of any kind (except the 47 bales cotton) from Mr. Feild, nor did we hear from him, either directly or indirectly, about his cotton, or any thing else, until after we advised him of the sale of his cotton, when his brother, acting for him, called to see us. This was in September, and about ten days after the sale of the cotton. I cannot state with certainty the precise date, but think somewhere between 20th and 25th Sept., 1866. He acknowledged that his brother had received the letter advising the sale of cotton, but had not had time to receive one of
33 7th inclosing ac. sales and our account current. I mention this to fix, as near as I can, the date W. H. Feild's brother, acting for him, called to see me. We wrote to W. H. Feild on 8th Aug., 1866, and herewith file a copy of our letter, marked Exhibit No. 3; this letter will explain itself. As we had received no answer to our former letters, we inclosed this one to S. H. Tucker, esq., of Little Rock, with the request for him to deliver it to Mr. Feild, and advise us. On 18th August he wrote us that the letter had been delivered to W. H. Feild.

In each of the letters referred to, we advised Mr. Feild of the downward tendency of prices, and asked him to let us know his views; we also advised him of the state of the market. Mr. Feild was always represented to us as entirely solvent and abundantly able to pay his debts; and we wished him to follow his own views about the sale of his cotton. After having written Mr. Feild as before stated, and not having heard from him, we sold his forty-seven bales cotton on 13th Sept., 1866, and advised him the same day of the sale. A copy of our letter is herewith filed marked Exhibit No. 4. I am well satisfied that all these letters had been received by Mr. Feild; I might say that the proof is almost positive of that fact. Letters to other parties in Little
34 Rock, sent by the same mail as our first letter, were duly acknowledged; another, enclosed to Mr. Tucker, was dilivered to Mr. Feild; and the third, advising the sale of the cotton, was acknowledged by Mr. Feild's brother, while acting as his agent, in talking to me about the sale of the 47 bales cotton. In addition to this, W. H. Feild's agent (in the person of his brother) stated to me (in the presence of our book-keeper, Mr. Lake) that the letters had all been placed in the hands of Judge Watkins, his brother's lawyer. I never saw W. H. Feild's brother but once, as I now recollect, and it was then when acting for W. H. Feild, he wished to see the cotton. I asked him his object; to which he replied that he marked the cotton, or a part of it, and would recognize it once. He stated that it was his brother's directions for him to examine the cotton. I told him the cotton had been paid for and delivered, but that I would go with him to see Mr. Stark (the agent or partner of Mr. Brown), who bought the cotton, and if it had not been shiped off, no doubt he could see it. We found Mr. Stark, who informed us that the cotton had been ship'd to Boston. Feild said he would be in Boston about the time the cotton reached there; and would
35 like to see it; and asked Stark for the name of party to whom [to whom] the cotton was shiped, which Stark gave him. I think Feild wrote the name of the consignee down, & put it in his pocket. This conversation was in my presence.

Mr. Feild afterwards returned to my office, and wrote a letter about the cotton to his brother, the defendant, at Little Rock, which he read me. I informed him, in this interview, which must have been fully ten days after the sale of the cotton, that if the sale was not satisfactory, I could get the samples and would furnish him with the same quality of cotton at the same price, if he would pay us his account. I made this

proposition to him as the agent of his brother, W. H. Feild, and he declined it.

I must state that upon delivery & examination of the forty-seven bales cotton, 14 bales were rejected by the purchaser, in consequence of being mixed, repacked, and old, damage. We examined the cotton carefully, and found it as represented; and to make the sale, we had to submit to a reduction of five cents p'r ℔ on the rejected cotton; which left the sale as follows: 33 bales at 30c.; 11 bales at 25c.; and 3 bales at 20c.; and advised W. H. Feild of this 17th September by letter,
36 a copy of which is herewith filed marked Exhibit No. 5. We sent him at the same time account of sales of the 47 bales cotton, a duplicate copy of which is herewith filed as a part of my deposition and marked Exhibit No. 6.

I also file our ac. current with Mr. Feild, marked Exhibit No. 7; which I likewise wish to make a part of my deposition.

Exhibit No. 6 shows the actual weights of the cotton, the marks, time of sale, price, to whom sold, and the various items of charges and expenses, and the net proceeds of the cotton. Exhibit No. 7 shows the money advanced, with six p'r cent. p'r annum interest on the same; and, after deducting the net proceeds of the cotton, shows a balance in cash due Farrington & Howell, the plaintiffs, on 15th September, 1866, of the sum of $6,695 74 from the defendant, W. H. Feild.

I also file herewith, as a part of my deposition, the bills lading, showing the marks and number of bales cotton received by Farrington & Howell from W. H. Feild. Bill lading p'r st'r "E. O. Stanard" for 45 bales cotton, dated 5th October, 1865, marked Exhibit No. 8; and bill lading by steamer "Zephyr," October 6th, 1865, for two bales, marked Exhibit No. 9. The business of Farrington & Howell, the plaintiffs, is conducted by both parties in a systematic manner, and aided by
37 competent clerks and employees; all papers, dispatches, letters, & bills lading are carefully filed away; and copies of all letters, account sales, and despatches of importance, taken by a copy press from the original transaction.

I have charge of all sales of cotton, and a general supervision of everything which relates to that department, as well as directing and controlling the monetary affairs of the business. The price realized for the cotton, as shown by Exhibit No. 6, was the best that such cotton was realizing in this market at that time; the samples had been shown to other buyers, and no one offered as much as the price Mr. Stark paid. The cotton was sold at the time above stated, because Farrington & Howell had dispaired of hearing from Mr. Feild, who appeared to them to have abandoned the cotton, and to have had no intention of assuming the control of it or of paying them the amount he owed them.

The cotton was incurring additional expenses and charges every day, and the general tendency of the market was downward. In addition to this, it was the season when the new crop would be thrown into market. The various letters of Farrington & Howell, which I have refer'd
38 to and filed as exhibits, show that they held up the cotton because they understood Mr. Feild to wish it to be held for better prices. I repeat that I had charge of the cotton department, and I had but one wish, and that was to act in a manner that would be satisfactory to Mr. Feild. I had other customers who thought the price of cotton would go higher, and the cotton is still in our warehouse, and was on hand even before we received Mr. Feild's cotton. I profess to use great diligence to obtain the value of all cotton that I have to sell, and so acted with this particular lot. Mr. Feild was well aware that his cotton had not been sold, and could have had it sold any day after its arrival

in Memphis; a word from him would have been sufficient; the letters which we wrote him show that beyond doubt. All the charges made in the account, as p'r Exhibit No. 6, are just and correct, and are such as were usually made by commission merchants in this city at the time; and the expenses charged were actually incurred and were necessary, and are such as were usual in this city at the time.

According to custom we were intitled to 2½ p'r cent. commission for the advance made, but we did not charge it in this case, as the ac-
39 count current herewith filed will show. In explanation of that part of my deposition on page 4, which relates to the sale of 47 bales cotton, I again refer to our letter of 12th September, marked Exhibit No. 4, which says:

"We have sold your 47 bales cotton, as follows:
44 bales at 30, and
3 " " 25, subject to examination upon delivery. We had all the buyers in the market to see the samples, and we feel authorized to say we sold at the highest price in the market."

Now, it will be seen by reference to our letter, 17th September, which is refered in this deposition as Exhibit No. 5, that, upon delevery of the cotton, 14 bales were rejected in consequence of being mixed, repacked, and old, damage; and to make a sale we had to submit to a reduction of five cents p'r lb. That is to say, that the 3 bales which were sold at 25 cents, were reduced to 20c.; and 11 bales out of the 44 bales, which were sold at 30c., were reduced to 25; the sale then stood as follows:

33 bales at 30.
11 " " 25.
3 " " 20.

This is the correct statement of the prices at which Farring-
40 ton & Howell sold the above 47 bales cotton; and the ac. sales, which is filed as Exhibit No. 6, show that the same figures were returned to Mr. W. H. Feild, and the net proceeds placed to his credit.

On 17th September, 1866, Farrington & Howell, the plaintiffs in this case, advised W. H. Feild, by letter and account current, that he owed them $6,695 74, for which they had drawn on him, in favor S. H. Tucker. Mr. Tucker advised us that Mr. Feild refused to pay the draft, and returned it unpaid to us. WM. M. FARRINGTON.

I am a member of the firm of Stratton, Goyer & Co., doing business in this city, and have been so connected since the 1st of October last. Prior to that time, from the 1st of April, 1865, I was in the employ of Farrington & Howell, of this city, as book-keeper. In the early part of October, 1865, Mr. W. H. Feild, of Little Rock, Arkansas, shipped them forty-seven (47) bales cotton. He either came on the same boat with the cotton, or arrived in the city about the same time. In order to ascertain the price his cotton would bring, he desired it should be put on the market, but with instructions not to be sold. Mr. Farrington,
41 who is cotton salesman of the firm, did so, but not getting an offer suitable to Mr. Feild's view, he was not willing his should be sold then; but he (Feild) being on his way north, he desired an advance on his cotton; and being represented as a gentleman of means and reliability, eleven thousand dollars (11,000) was given him by me, the receipt of which is attached herewith and marked Exhibit No. A. The inducement to make this large advance (besides Mr. Feild's recommendations of integrity and solvency) was his intimations of shipping more cotton, as he, in company with Mr. Farrington, went around to the insurance company to try and get the rate of marine insurance reduced from Little Rock to this place on his cotton. He left the cotton discretionary, but

was an advocate of higher prices, as a majority of the customers were. Fully desiring to carry out Mr. Feild's views and extremely anxious of benefitting him in the best possible manner, the cotton was not sold. The price depreciating, Mr. Farrington suggested to me the propriety of selling Mr. Feild's cotton, but I thought it best to suggest the same to Mr. Feild, in order that his wishes might still be our guidance.

Not hearing from him, a second letter was written, and a third
42 one. With the third one, I wrote one myself to Mr. S. H. Tucker, of Little Rock, a reliable and prominent banker of that place, asking him to deliver the letter personally to Mr. Feild, in order that we might certainly know of his hearing from us. This letter was delivered, as Mr. Tucker acknowledges. Still not hearing from him, and with no prospects of it, the cotton was sold in September, 1866, and the very best possible price at that time was obtained. The acc't sales were made up by myself, then still in the capacity of book-keeper for Farrington & Howell, and the charges were just & legitimate. I cheerfully add to this, that whilst in the employ of Messrs. Farrington & Howell I found them diligent and prompt, zealously guarding the interests of every one entrusting any business to their care.

I mean by Farrington & Howell, the plaintiffs in this suit, and by W. H. Feild, the defendant. The telegram marked Exhibit No. 1 to the deposition of W. M. Farrington in this case was received by the plaintiffs about 10th Octo., 1865. Exhibit No. 2 to deposition of W. M. Farrington in this case is a copy of the letter written at my suggestion.

Exhibit No. 3 to deposition of W. M. Farrington in this case is a
43 copy of the letter written at my suggestion. Exhibit No. 4 to deposition of W. M. Farrington in this case is a copy of the letter written by the plaintiffs to the defendant, announcing the sale of cotton. Exhibit No. 6 to deposition of W. M. Farrington in this case is a copy of the acc't sales of the forty-seven bales cotton sent the defendant; the original was made out by myself. The acc't sales shows the true weights and real price for which the cotton was sold. The acc't sales shows the charges and expenses. The $2\frac{1}{2}$ % commission was, at the time the sales were made, the customary charge in this market. Exhibit No. 7 to the deposition of W. M. Farrington in this case is a copy of the acc't current made for the plaintiffs by me, or under my supervision, and sent to the defendant. Exhibits No. 8 & 9 to the deposition of W. M. Farrington in this case are the original bills lading of the forty-seven bales cotton. The cotton was sold, subject to examination by the purchaser, and, when examined, fourteen bales were rejected for being mixed, and a reduction in price had to be submitted to in order to effect the sale.

JAMES H. McDAVITT.

44 I am now, and was in October, 1866, a cotton broker in the city of Memphis. I was then, and am now, familiar with the prices of cotton in this market, being almost constantly in the market. In the latter part of August, and early in September, 1866, the plaintiffs offered to sell me, according to the samples shown me, a lot of forty-seven bales of cotton, marked W $\overset{43}{H}$ F, $\boxed{W\ \overset{3}{H}\ F}$, W $\overset{1}{H}$ F. Cotton is sold in this market by the sample, and it is the understanding that the cotton in the bales must correspond in quality with the samples. 44 bales of the cotton, as indicated by the samples shown me, ranged from good ordinary to low middling, and three bales were low ordinary. Within the period above mentioned, I frequently offered 29 cents round for the 47 bales, understanding that it corresponded with the samples.

Bob

I considered that I offered the full value of the cotton. Plaintiffs asked 30 cents per pound for it, which I refused to give. On the day the plaintiffs sold the cotton I offered 29½ cents round for it, but later in the day the plaintiff sold 44 bales of the cotton for 30 cents per pound, and 3 bales for 25 cents per pound. I considered the sale at the time a tip-top sale, and so expressed myself to the plaintiffs and the buyer.

45 It is customary in this market, after a sale is made by samples, for the buyer to examine the bales, drawing samples from the centre of the bale as well as from the edge, and in case the quality of the cotton drawn from the centre of the bale proves inferior to that drawn from the edge of the bale it is optional with the purchaser either to reject such entirely or agree with the seller about the proper reduction in price, it being entirely at the option of the purchaser to reject or take such cotton as may prove to be mixed in quality.

WM. A. GOODWYN.

I know the plaintiffs to this suit, but I do not know the defendant. On the 12th of September last, as agent for Janes Brown, I purchased of the plaintiffs 47 bales cotton marked W H F, 43 bales; W H F, 3 bales; W H F, 1 bale. The purchase was of 44 bales at 30 cents per pound, and 3 bales at 25 cents per pound, bought subject to examination upon delivery. Upon examination of this cotton I found 14 bales of it repacked, mixed, and old, damaged; and I went at once to Mr. Farrington, one of the plaintiffs, and informed him of this fact, and that I could not pay him for the cotton unless the price of these

46 bales was reduced to their real value. I had bought the cotton by the samples, as is customary in this market, and found the bales contained inferior cotton to that the samples represented. I also found cotton seed in nearly all of these bales, which appeared as if there had been some defect in the ginning, or great carelessness in the packing or baling of the cotton. These defects in the cotton could not have been discovered without an examination of the bales. Examination is made by boring with a cotton auger to the centre of the bale and pulling out samples. I was well acquainted with the prices of cotton in this market at that time. I considered at the time of examination, and still think, that 11 bales were worth not over 25 cents per pound, and 3 bales over 20 cents per pound; the last-mentioned 3 bales were the 3 bales originally sold at 25 cents per pound. This is all that I would have paid for the cotton, nor do I think any other buyer in the city would have paid more. I know this lot of cotton was offered to other buyers, as I saw them looking at the samples on the tables in the cotton

47 office of the plaintiff. A person representing himself to be the brother of the defendant called on me, in company with Mr. Farrington, one of the plaintiffs, a few days after the purchase the cotton, and asked me what I had done with the cotton. I told him I had shipped it to Messrs. Jenkin Bro. & Chipman, Boston, Massachusetts. I I think I gave him the name of the street in Boston in which the consignees did business, and he took a memorandum of the fact. I also informed him that the cotton was not shipped in the original mark, and I gave him the mark in which it was shipped. My recollection is, he said he was going north and he said he would see the cotton. The price I paid to the plaintiffs on final settlement was as follows:

33 bales, at 30 cents per pound.
11 bales, at 25 cents per pound.
3 bales, at 20 cents per pound.

J. B. STARKE.

Exhibit No. 1.

U. S. MILITARY TELEGRAPH, *Oct.* 10, 1865.

By telegraph from Moscow, 10, 1865.
To Farrington & Howell:

Do not sell my cotton till I see you.

48 A. FEILD.

9 Ge 50 pd.

Exhibit No. 2.

FARRINGTON & HOWELL, COTTON FACTORS,
GROCERS, & COMMISSION MERCHANTS,
Memphis, Nov. 16th, 1865.

W. H. FEILD, Esq., *Little Rock:*

DEAR SIR: We have not sold your cotton, as the market has been dull and on the decline every day since you left. The dispatches from New York yesterday quote middling cotton about 50, & very dull. The public dispatches quote 50c., 51, while the private give 49c., 50. Your cotton would not, in the present market, sell here for over 43c., 44. As the money market is very tight, we will be compelled to sell your cotton unless you make other shipments or remit us as a margin in cash.

We have held on thus far to meet your views, but the declining tendency of the market induces us to write this letter. Please to let us hear from you on rec'pt.

Very truly, y'r friends,

FARRINGTON & HOWELL.

49 *Exhibit No.* 3.

FARRINGTON & HOWELL, COTTON FACTORS,
GROCERS, & COMMISSION MERCHANTS,
Memphis, Aug. 8th, 1866.

W. H. FEILD, Esq., *Little Rock, Ark's:*

DEAR SIR: We have been much astonished at not hearing from you in regard to your cotton. We wrote you on the subject, and requested a reply, but have heard nothing from you. By the same mail we wrote to other parties in your city, and we received due acknowledgment. This was many months ago, date not recollected. When you left your cotton here you were not satisfied with the market, although that was about 50c. When you returned from the northern cities you approved of our efforts to promote your interest, & that the cotton had not been sold. The price has greatly declined, & the expenses have been going on.

Now let us hear your views. The cotton will not pay your account, as you know, & we ask you to remit us for the ballance. According to the present market the cotton would be well sold at 32c., including internal revenue. We have now waited to meet your views until
50 it is necessary for something to be done. Will you please write us on receipt of this, for we are anxious to hear from you?

Very resp'y,

FARRINGTON & HOWELL.

Exhibit No. 4.

FARRINGTON & HOWELL, COTTON FACTORS,
GROCERS, & COMMISSION MERCHANTS,
Memphis, Sept. 12th, 1866.

W. H. FEILD, Esq., *Little Rock, Ark's:*

DEAR SIR: We wrote you some time ago that we would sell your cotton unless we heard from you, with a remittance.

An improved demand exists to-day, and we have sold your 47 bales, as follows: 44 bales, at 30c.; & 3 bales, at 25c., subject to examination upon delivery. We have had all the buyers in the market to see the samples, & we feel authorized to say we sold at the highest price in the market. We will send ac. sales & ac. current so soon as we get through with the delivery.

Very resp.,

FARRINGTON & HOWELL.

Exhibit No. 5.

[Copy.]

MEMPHIS, *Sept. 17th*, 1866.

51 W. H. FEELD, Esq., *Little Rock, Ark's:*

DEAR SIR: We wrote you 12th, advising sale of your cotton, 44 bales at 30, and 3 bales at 25, subject to examination. Upon delivery of the cotton, 14 bales were rejected, in consequence of being mixed, repacked, and old, damaged. We examined the cotton carefully, and found it as represented; and, to make a sale, we had to submit to a reduction of 5 cents per lb. on the rejected cotton, which left the sale, 33 bales at 30c., 11 bales at 25c., & 3 bales at 20c.; and we hand enclosed ac. of sales for the 47 bales, at these prices. No doubt, the sale will appear low, but it could not be duplicated at the same price to-day.

We also hand enclosed your ac., showing balance due us, $6,695$\frac{74}{100}$; and we have drawn on you this day for this balance, in favor of S. H. Tucker, which please pay.

Very resp.,

FARRINGTON & HOWELL.

DUPLICATE.—*Sale by Farrington & Howell, No. 268 Front street, Memphis, of 47 bales cotton to James Brown, for account of W. H. Feild, esq.*

Sept. 12, 1866.

W H F	1	493			
W H F	1	400			
		491			
			1,384, *a* 20c.	276 80	[Over.
52			Over..	276 80	
W H F BOB	1	413	505		
W H F	1	480	478		
W H F	9	385	476		
		447	422		
		490	538		
		457	2,419		
		2,672	2,672		
	11 bales.....		5,091, *a* 25c.	1,272 75	

W H F	1.....	469	506	445		
W H F	32.....	438	490	522		
		490	461	543		
		509	448	494		
		413	470	477		
		429	501	402		
		436	486	554		
		512	491	493		
		503	468	512		
		458	362	469		
		486	541	345		
			5, 224			
		5, 143	5, 143			
			5, 256	5, 256		
	33 bales.....		15, 623,	*a* 30c...	4, 686 90	
					6, 236 45	
Off for 1 light					1	
						6, 235 45
Charges:						
Freight & charges boat.....					129 75	
Drayage					11 75	
River insurance, $1\frac{1}{2}$ a|c on 200, per bale.....					141	
Fire insurance, 6 mos., on 200, per bale					376	
53	5 " " 150, " "				255 56	
					631 56	
Government tax on sales, $\frac{1}{10}$ a|c.....					6 23	
Storage, 152 75					152 75	
Repairs					81 75	
Commissions, 2 1-2 per cent., on 6,235 45.....					155 89	
						1, 310 68
Net proceeds						$4, 924 77

MEMPHIS, TENN., *September 15th*, 1866.

Exhibit No. 7.

W. H. Feild, in ac. with Farrington & Howell.

1865. DR.

Oct. 13.	To cash, as per y'r receipt.....		11, 000 00
1866.			
Sept. 15.	" interest on 11,000, 11 mos.	605 00	
	" " " freight & drayage, river insurance, 282 50, 11 mos.....	15 51	
		620 51	
			11, 620 51

CR.

1866.		
Sept. 15.	By sales 47 bales cotton	4, 924 77
	Balance due F. & H.....	$6, 695 74

MEMPHIS, TENN., *September 15th*, 1866.

Exhibit No. 8.

54 Shipped, in good order and condition, by W. H. Feild (on account and risk of whom it may concern), on board the good steamboat called the E. O. Stanard, whereof Wharton is master for the present voyage, now lying at the port of Little Rock, and bound for Memphis, the following articles, marked and numbered as below, which are to be delivered, without delay, in like good order and condition, at the aforesaid port (the dangers of the river, fire, and unavoidable accidents only excepted), unto Farrington & Howell, or to his or their assigns, he or they paying freight for said goods, at the rate of $2 75 per bale, and charges.

In witness whereof, the master, clerk, or agent of said boat subscribes to bills of lading, all of this tenor and date, one of which being accomplished, the others stand void.

Dated at Little Rock this 5 day of Oct., 1865.

Marks.	Articles.	Weight.
W H F	42 bales cotton.	
W H F	3 " do.	
	45	

Privilege lighting & reshipping.

GALL.

[2 cents. U. S. int. rev. ×]

Exhibit No. 9.

LITTLE ROCK, *Oct. 6th*, 1865.

55 Shipped by W. H. Field, in good order and condition, on board the good steamboat called the Zephyr, whereof De Main is master for the present voyage, now lying at the port of Little Rock, and bound for Memphis, the following packages of articles, which are to be delivered, without delay, in like good order, at the port of Memphis (unavoidable dangers of the river and fire excepted), unto Farrington & Howell, or their assigns, he or they paying freight, at the rate of three (3^{00}) dollars per bale.

In witness wheref, the owner, master, or clerk of said steamboat hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others stand void:

Marks.	Articles.	Weight.
W H F	1 one bale cotton.	
W H F B O B	1 one bale cotton.	
	2 b. c.	

O. K. BILLY W. GREENE, *Clk.*

[2 cents U. S. int. rev. W. H. F. Oct. 6, '65.]

I am a citizen of Memphis, State of Tennessee, and have been for the past two years. Am a cotton factor and commission merchant in said city. I was engaged in that business in Oct., 1865. I am acquainted with the custom and general rules governing commission merchants in said city. It is the custom of commission merchants, and the duty to

do so, to sell cotton or other products placed with them for sale,
56 on arrival, at the best market price, unless otherwise ordered by shiper; but where it is shiped, and the party writes the coms. merchant to use his own discretion in selling, he may hold as long as he thinks best, unless other instructions are given. In case where a merchant advances on cotton in store, he has the right to sell whenever the cotton approximates to the am't advanced, and will do so, unless the owner has made a special arrangement to have him hold it. Where a party draws on cotton, it is customary to charge him interest on the advance.

Money was worth in Oct., 1865, in the city of Memphis, to No. 1 men, 1 % p'r month. I am acquainted with the house or firm of Farrington & Howell, and regard them as good business men, and stand well.

Cross-examined by plaintiffs:

Where cotton is rec'd, and nearly the worth of it is drawn or received by the owner, and the cotton is to be held for some time, it is usual to charge 2½ % for the advance.

F. M. McLEFRESH.

And thereupon the plaintiffs rested their case.

Mr. Barnes, a witness for defendant, being duly sworn, proved
57 a printed price current, published in New York, from October 1, 1865, until September, 1866, showing a gradual decline in cotton from the 26th October until the time the cotton was sold, as shown by the plaintiffs' witnesses, and particularly prices as follows:

OCT. 28, 1865.

	Upland.	Florida.	Mobile.	N. O. & Tex.
Ordinary, per lb.	48	48	48	48
Good ordinary	52	52	52	53
Middling	58	58	59	59
Good middling	61	62	63	64
Middling fair				

DEC. 2, 1865.

To-day's market closed quiet at the following quotations:

	Upland.	Florida.	Mobile.	N. O. & Tex.
Ordinary, per lb.	41	41	41	41
Good ordinary	42	43	44	44
Low middling	47	47	48	49
Middling	49	50	50	51
Good middling	52	53	54	55
Middling fair				

The difference between the price of cotton in New Nork and Memphis is from one to two and a half cents where the tax has been paid, the price being higher in New York.

Silas F. Feild, a witness for defendant, swore as follows:

58 I am a brother of defendant, and the person mentioned as such by Mr. Farrington in his deposition. I called on the plaintiffs at the

time stated by Mr. Farrington, and asked to see the cotton shipped by my brother. He told me that he had sold it to Mr. Starke; and having sent for Mr. Starke, the latter said that the cotton had been shipped by him to Boston. I told him that I was going east, and would perhaps be at Boston, and would like to get to see the cotton; and so he gave me the address of his consignee in Boston. In effect, I did not go any further than New York, and never saw the cotton afterwards. My object was to see whether other and inferior cotton had not been substituted for that shipped by my brother to Messrs. Farrington & Howell. I did not act as the agent of my brother in this respect, and had no authority from him in the premises. I had heard my brother frequently speak of the matter, and I had suspitions that he had been swindled by the plaintiffs by such a substitution as I have spoken of; and having some leisure time in Memphis, I concluded to look into the business a little. I never told Farrington & Howell, nor any one else, that I was acting as my brother's agent. I had no other interest in this matter than that interest that one has or feels for his brother.

The defendant proved by Mr. Griffith and Mr. Kingsbury that
59 the custom of commission merchants and cotton factors at Memphis is to charge two and a half per cent. for advances made on cotton; and that, where large advances have been made on cotton, and no specific instructions are given as to the time or mode of sale, the commission merchant may, according to custom, sell at any time, and reimburse himself.

William H. Feild, the defendant, being sworn, stated that he shipped the 47 bales of cotton to the plaintiffs on the recommendation of Mr. Tucker, of Little Rock, never having had any business or acquaintance with them before. He placed the cotton in the plaintiffs' hands, with instructions to sell immediately. He then left Memphis, and on getting to Moscow, distant about three hours by rail from Memphis, he saw that cotton was advancing in value, and he sent to the plaintiffs the despatch mentioned in the deposition of Mr. Farrington, telling them not to sell the cotton until he saw them. On his return to Memphis, which was after an absence of three days, he obtained from the plaintiffs the advance of eleven thousand dollars, and gave them express instructions to sell the cotton within ten days, and to reimburse themselves for the money thus advanced. The plaintiffs undertook to do so, and, as the cotton
60 at the prices then prevailing would have brought some hundreds of dollars over the amount advanced by the plaintiffs, they said that they would charge no commissions for their advance. I then went east, and returned in about fourteen or fifteen days to Memphis, where I only made an hour's stay on my way home to Little Rock, which I occupied in seeing the plaintiffs. Cotton had declined one cent on the pound since I had told them to sell, and I remonstrated with them for not having sold. They excused themselves by saying that they had only been acting for my interest, which excuse I accepted. I, however, renewed my instructions, and the last words I said to Mr. Farrington, on shaking hands with him, were these: "Whatever you do, do not let the cotton fall one cent lower." I heard no more from the plaintiffs until I received their letter of the 16th of November, a copy of which is referred to, and made an exhibit to the deposition of Mr. Farrington. I was then surprised to learn that the cotton had not been sold. I thought the plaintiffs had made themselves liable by their neglect to sell. I was afraid to answer their letter, as I regarded it as a mere endeavour to obtain some

admission or concession from me; and I concluded to abandon the matter, leaving them with whatever responsibility they might
61 have incurred. Cotton had fallen in the market very considerably, and I did not feel disposed to make myself a party to their delinquency. I afterwards received from the plaintiffs the other letters referred to in the deposition of Mr. Farrington, and copies of which are made exhibits to the same. (Here the witness produced the originals in court.) I have never answered either of them, and from the reason which I have stated; nor have I had any further correspondence with the plaintiffs. It was between the 25th and the 28th October, 1865, when I last saw the plaintiffs at Memphis. Had they sold the cotton within ten days after I left, it would have repaid the advance paid me. If sold on the date of their first letter to me, it would not have repaid the advance by a considerable sum; and, from that time until the date of their sale, as reported, the price of cotton gradually declined. In October, 1865, and in November of the same year, cotton was about two cents lower in Memphis than in New York, where the tax had been paid; and the tax had been paid on this cotton.

And this was all the evidence in the case. Thereupon the defendant asked the court to give the following instructions, to wit:

62 If the jury find from the evidence that, after the cotton was placed in the hands of the plaintiffs, Feild gave them instructions to sell before the price should fall any lower, and that the plaintiffs failed to do so, then the plaintiffs must suffer any loss occasioned by reason of their failure to sell at that time, and Feild is entitled to a credit for the amount that the cotton would have brought if sold at the time such instructions were given.

Refused.

2. If the jury find from the evidence that the cotton was left by defendant in the hands of the plaintiffs to sell without any specific orders as to the time and mode of sale; and that the plaintiffs had made large advanc s on account of said cotton, then the plaintiffs were bound to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade might require, and to reimburse themselves for their advances out of the proceeds of the sale, and the defendant could not, by his silence, prevent the plaintiffs from making such sale; and if the jury find from the evidence that the plaintiffs did not exercise a sound discretion in the premises, and kept the cotton on hand for an unreasonable and improper length of time, then the defendant is entitled to a
63 credit not for the amount which it would have brought, if sold in accordance with the usage of trade and the exercise of such discretion.

If the jury find from the evidence that the cotton was shipped, by defendant to plaintiffs, as commission merchants, to be sold; and that the plaintiffs made large advancements on the same; and that the plaintiffs wrote to the defendant that, unless other shipments were made them, or the defendant made them remittances in cash, they would sell the cotton, then, on the failure of defendant to write to plaintiffs in reply, the plaintiffs were bound to sell the cotton in a reasonable time; and the defendant is entitled to a credit on the plaintiffs' demand for the amount which the cotton would have brought, if sold within a reasonable time after the failure of the defendant to answer said letter.

Refused.

And the court refused to give the same, or either of them; and in li thereof, instructed the jury—

"That in case they find that defendant gave the plaintiffs instructions orally to sell the cotton before any further fall in the price; and
64 that the plaintiffs failed to do so, but afterwards, on the 16th day of November, 1865, wrote the letter mentioned in the testimony of Mr. Farrington and Mr. Field of that date; and that Mr. Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant."

The court also charged the jury that, as a general principle, plaintiffs, as factors, were bound to use due diligence, care, and skill in the sale of the cotton committed to them for sale; and that it was their duty to obey instructions given them by defendant in regard to a sale.

SAM. F. MILLER.

And to the ruling of the court in refusing to give the instructions asked by the defendant, and in giving the instruction aforesaid on its own motion, the defendant at the time excepted, and, to save his exceptions, obtained leave to file here his bill of exceptions at any time during the same term of the court. And now, on this 1st May, 1868, and during the same term, the defendant tenders here this his bill of
65 exceptions, which, being found correct, is signed, sealed, and made a part of the record herein.

SAM. F. MILLER. [SEAL.]
HENRY C. CALDWELL.

Filed May 5, 1868.

CHAS. P. REDMOND, *Clk.*

And which supersedeas bond is in the words and figures following, to wit:

Know all men by these presents, that we, William H. Feild, P. H. Benton, Samuel F. Dolley, and Silas F. Feild, are held and firmly bound unto William M. Farrington and Henry B. Howell, partners, under the firm name of Farrington & Howell, in the just and full sum of nine thousand dollars, payment whereof well and truly to be made, we do bind ourselves, each and all of us, our administrators and our heirs, respectively; conditioned, however, that whereas the said William H. Feild is about to sue out a writ of error from the circuit court of the United States for the eastern district of Arkansas to the Supreme Court of the United States
66 upon the judgment of such court in an action of assumpsit brought by said Farrington & Howell against said William H. Feild: Now, therefore, the condition of this obligation is such, that if the said William H. Feild shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; else to be of full force.

W. H. FEILD. [SEAL.]
P. H. BENTON. [SEAL.]
SAM'L F. DOLLY. [SEAL.]
SILAS F. FEILD. [SEAL.]

ISAAC LAWRENCE. [SEAL.]

UNITED STATES OF AMERICA, *ss:*

I, Silas F. Feild, do solemnly swear that, after payment of my just

admission or concession from me; and I concluded to abandon the matter, leaving them with whatever responsibility they might
61 have incurred. Cotton had fallen in the market very considerably, and I did not feel disposed to make myself a party to their delinquency. I afterwards received from the plaintiffs the other letters referred to in the deposition of Mr. Farrington, and copies of which are made exhibits to the same. (Here the witness produced the originals in court.) I have never answered either of them, and from the reason which I have stated; nor have I had any further correspondence with the plaintiffs. It was between the 25th and the 28th October, 1865, when I last saw the plaintiffs at Memphis. Had they sold the cotton within ten days after I left, it would have repaid the advance paid me. If sold on the date of their first letter to me, it would not have repaid the advance by a considerable sum; and, from that time until the date of their sale, as reported, the price of cotton gradually declined. In October, 1865, and in November of the same year, cotton was about two cents lower in Memphis than in New York, where the tax had been paid; and the tax had been paid on this cotton.

And this was all the evidence in the case. Thereupon the defendant asked the court to give the following instructions, to wit:

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Refused.

2. If the jury find from the evidence that the cotton was left by defendant in the hands of the plaintiffs to sell without any specific orders as to the time and mode of sale; and that the plaintiffs had made large advanc s on account of said cotton, then the plaintiffs were bound to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade might require, and to reimburse themselves for their advances out of the proceeds of the sale, and the defendant could not, by his silence, prevent the plaintiffs from making such sale; and if the jury find from the evidence that the plaintiffs did not exercise a sound discretion in the premises, and kept the cotton on hand for an unreasonable and improper length of time, then the defendant is entitled to a
63 credit not for the amount which it would have brought, if sold in accordance with the usage of trade and the exercise of such discretion.

If the jury find from the evidence that the cotton was shipped, by defendant to plaintiffs, as commission merchants, to be sold; and that the plaintiffs made large advancements on the same; and that the plaintiffs wrote to the defendant that, unless other shipments were made them, or the defendant made them remittances in cash, they would sell the cotton, then, on the failure of defendant to write to plaintiffs in reply, the plaintiffs were bound to sell the cotton in a reasonable time; and the defendant is entitled to a credit on the plaintiffs' demand for the amount which the cotton would have brought, if sold within a reasonable time after the failure of the defendant to answer said letter.

Refused.

And the court refused to give the same, or either of them; and in lieu thereof, instructed the jury—

"That in case they find that defendant gave the plaintiffs instructions orally to sell the cotton before any further fall in the price; and
64 that the plaintiffs failed to do so, but afterwards, on the 16th day of November, 1865, wrote the letter mentioned in the testimony of Mr. Farrington and Mr. Field of that date; and that Mr. Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant."

The court also charged the jury that, as a general principle, plaintiffs, as factors, were bound to use due diligence, care, and skill in the sale of the cotton committed to them for sale; and that it was their duty to obey instructions given them by defendant in regard to a sale.

SAM. F. MILLER.

And to the ruling of the court in refusing to give the instructions asked by the defendant, and in giving the instruction aforesaid on its own motion, the defendant at the time excepted, and, to save his exceptions, obtained leave to file here his bill of exceptions at any time during the same term of the court. And now, on this 1st May, 1868, and during the same term, the defendant tenders here this his bill of
65 exceptions, which, being found correct, is signed, sealed, and made a part of the record herein.

SAM. F. MILLER. [SEAL.]
HENRY C. CALDWELL.

Filed May 5, 1868.

CHAS. P. REDMOND, *Clk.*

And which supersedeas bond is in the words and figures following, to wit:

Know all men by these presents, that we, William H. Feild, P. H. Benton, Samuel F. Dolley, and Silas F. Feild, are held and firmly bound unto William M. Farrington and Henry B. Howell, partners, under the firm name of Farrington & Howell, in the just and full sum of nine thousand dollars, payment whereof well and truly to be made, we do bind ourselves, each and all of us, our administrators and our heirs, respectively; conditioned, however, that whereas the said William H. Feild is about to sue out a writ of error from the circuit court of the United States for the eastern district of Arkansas to the Supreme Court of the United States
66 upon the judgment of such court in an action of assumpsit brought by said Farrington & Howell against said William H. Feild: Now, therefore, the condition of this obligation is such, that if the said William H. Feild shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; else to be of full force.

W. H. FEILD. [SEAL.]
P. H. BENTON. [SEAL.]
SAM'L F. DOLLY. [SEAL.]
SILAS F. FEILD. [SEAL.]

ISAAC LAWRENCE. [SEAL.]

UNITED STATES OF AMERICA, *ss:*

I, Silas F. Feild, do solemnly swear that, after payment of my just

debts and setting aside property exempt from execution, I verily believe that I am worth the sum of ten thousand dollars.

SILAS F. FEILD.

Sworn to before me this 5th May, 1868.

CHAS. P. REDMOND, *Clk.*

UNITED STATES OF AMERICA, *ss:*

67 I, Samuel F. Dolley, do solemnly swear that, after payment of my just debts and setting aside property exempt from execution, I verily believe that I am worth the sum of ten thousand dollars.

SAM'L F. DOLLEY.

Sworn to before me this 5th May, 1868.

CHAS. P. REDMOND, *Clk.*

Filed May 5th, 1868.

CHAS. P. REDMOND, *Cl'k.*

And on the 20th day of October, A. D. 1868, the defendant files herein a citation to Farrington & Howell, which is in the words and figures following, to wit:

68 By the Honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, to William M. Farrington and Henry B. Howell, partners, doing business under the firm name of Farrington & Howell:

Whereas William H. Feild lately sued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States for the eastern district of Arkansas, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between yourselves as plaintiff and himself as defendant, a manifest error hath happened, to the great damage of the said William H. Feild.

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be holden, at the city of Washington, on the 7th day of December next: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said 7th day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Little Rock, in the eastern district of Arkansas, in the 8th circuit, the 8th day of October, in the year of our Lord one thousand eight hundred and sixty eight, and of the independence of the United States the ninety-third.

HENRY C. CALDWELL,
District Judge.

STATE OF ARKANSAS, *ss:*

We, Farrington & Howell, defendants in error in the within citation mentioned, hereby acknowledge service of the said citation Oct. 20, 1868.

GALLAGHER & NEWTON, &
GARLAND & NASH,
Att'ys for Def'ts.

Filed Oct. 20, 1868.

CHAS. P. REDMOND, *Clerk.*

69 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Charles P. Redmond, clerk of the circuit court of the United States for the eastern district of Arkansas in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of their originals, on file and remaining of record in my office, being a complete transcript in the said cause.

In witness whereof, I have hereunto set my hand and the seal of said court, this thirtieth day of October, in the year of our Lord one [SEAL.] thousand eight hundred and sixty-eight, and of the independence of the United States of America the ninety-third.

Attest: CHAS. P. REDMOND, *Clerk.*

Clerk's fee, 16^{00}, paid by the appellant.

CHAS. P. REDMOND, *Clerk.*

(Indorsement on record:) E. Arkansas C. C. U. S. No. 243. William H. Field, plaintiff in error, vs. William M. Farrington and Henry B. Howell, partners as Farrington & Howell.

Filed 22d July, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 243.

WILLIAM H. FIELD

vs.

FARRINGTON & HOWELL.

AGREEMENT OF COUNSEL AND ASSIGNMENT OF ERRORS.—FILED MARCH 2, 1870.

1 Supreme Court of the United States.

WILLIAM H. FIELD, PLAINTIFF,
v.
FARRINGTON & HOWELL, DEFENDANTS.

The undersigned counsel herein agree and admit that the word "not" in the third line from the bottom of the second instructions asked by the defendant, on p. 22 of the transcript, is an error in copying or printing, and is to be considered as expunged.

WATKINS & ROSE, *for Pl'ff's.*
A. H. GARLAND, *for Def'ts.*

2 (Indorsed:) Sup. Court U. S. '69, Dec. term. No. 243. William H. Field v. Farrington & Howell. Agreement of counsel. Filed 2d March, 1870.

3 Supreme Court of the United States.—243, December term, 1869.

WILLIAM H. FIELD, PLAINTIFF,
v.
FARRINGTON & HOWELL, DEFENDANTS. } In error.

Afterwards, to wit, on the first Monday in December, 1869, in the said Supreme Court of the United States, before the justices thereof, at the Capitol in the city of Washington, comes the said William H. Field, by Watkins & Rose, his attorneys, and says that in the record and proceedings aforesaid there is a manifest error in this:

The court erred in giving the instruction given on its own motion, and in refusing to give the three instructions asked by the defendant

below. There is also error in this, that by the record aforesaid it appears that the judgment aforesaid was given for the said Farrington & Howell against the said Field; whereas, by the law of the land, the said judgment should have been given for the said Field against the said Farrington & Howell. And the said Field prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing.

4

WATKINS & ROSE,
For Plaintiff in Error.

(Indorsed:) Sup. Court U. S. Dec. term, 1869. No. 243. William H. Field v. Farrington & Howell. Assignment of errors. Watkins & Rose.

Filed 2d March, 1870.

below. There is also error in this, that by the record aforesaid it appears that the judgment aforesaid was given for the said Farrington & Howell against the said Field; whereas, by the law of the land, the said judgment should have been given for the said Field against the said Farrington & Howell. And the said Field prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing.

WATKINS & ROSE,
For Plaintiff in Error.

(Indorsed:) Sup. Court U. S. Dec. term, 1869. No. 243. William H. Field v. Farrington & Howell. Assignment of errors. Watkins & Rose.

Filed 2d March, 1870.

IN THE

SUPREME COURT OF THE UNITED STATES

[No. 243.]

WILLIAM H. FEILD, PLAINTIFF IN ERROR.

vs.

WILLIAM M. FARRINGTON AND HENRY B. HOWELL, PARTNERS AS FARRINGTON & HOWELL, DEFENDANTS.

In Error to the Circuit Court of the United States, for the Eastern District of Arkansas.

BRIEF FOR APPELLANT.

GAZETTE PRINT, LITTLE ROCK, ARK.

IN THE

SUPREME COURT OF THE UNITED STATES

[No. 243.]

WILLIAM H. FEILD, PLAINTIFF IN ERROR.

vs.

WILLIAM M. FARRINGTON AND HENRY B. HOWELL, PARTNERS AS FARRINGTON & HOWELL, DEFENDANTS.

In Error to the Circuit Court of the United States, for the Eastern District of Arkansas.

BRIEF FOR APPELLANT.

GAZETTE PRINT, LITTLE ROCK, ARK.

ARGUMENT.

—o—

On the 9th day of October, 1865, the defendants in error, being cotton factors at Memphis, Tennessee, received from the plaintiff forty-seven bales of cotton. Feild testified that he gave the factors orders to sell immediately. On the next day, however, he telegraphed them from Moscow, a railway station near Memphis, not to sell until he saw them again. Three days afterwards he returned to Memphis, obtained an advance of eleven thousand dollars, being about the value of the cotton, from the factors, and says that he gave them express instructions to sell the cotton within ten days, and to reimburse themselves for the money advanced. The large amount advanced makes the statement reasonable, and forbids the presumption that the factors were to retain the cotton at the will of Feild. Feild further testifies that on his return to Memphis, after another absence of about fourteen days, cotton had declined one cent on the pound. He remonstrated with the factors for their delay, renewed his instructions, and in the most emphatic terms. Feild says that in view of the fact that the cotton was to be sold at once, the factors agreed to charge no commission; a statement that derives corroboration from the statement of Farrington, (Tr., p. 13,) that in effect the factors charged no commissions; and as gratuities are not common and not presumed in

the commercial world, nor yet among litigants, who usually reserve all their strength for the legal contest, some understanding of that kind is almost a necessary implication.

Such is the testimony of Feild. Farrington says, (Tr., p. 10,) "He left the cotton to be sold at our discretion."

We call attention to the evidence on this point, not for the purpose of balancing probabilities, but because we deem it necessary in order to a right understanding of the case, and because we believe that the instruction given by the court virtually excluded it from the jury, by an estoppel unauthorized by law.

Nothing further transpired between the parties until the 16th of November following, when the following letter was sent to Feild:

Memphis, Nov. 16th, 1865.

W. H. FEILD, Esq., *Little Rock, Ark's:*

DEAR SIR: We have not sold your cotton, as the market has been dull and on the decline every day since you left. The dispatches from New York yesterday quote middling cotton at about 50, and very dull. The public dispatches quote 50@51, while the private give 49@50. As the money market is very tight, *we will be compelled to sell your cotton*, unless you make other shipments or remit us a margin in cash.

We have held on thus far to meet your views, but the declining tendency of the market induces us to write you this letter. Please to let us hear from you on receipt.

Very truly, your friends,

FARRINGTON & HOWELL.

This letter was never answered. That the failure to answer it was a matter deserving of serious consideration, we do not deny;

but we affirm that it was to be considered, like any other fact, by the jury, and not by the court.

Feild says (Tr., p. 21,) that on receipt of this letter, "I was surprised to learn that the cotton had not been sold. I thought that the plaintiffs had made themselves liable by their neglect to sell. I was afraid to answer their letter, as I regarded it as a mere endeavor to obtain some admission or concession from me; and I concluded to abandon the matter, leaving them with whatever responsibility they might have incurred. Cotton had fallen in the market very considerably, and I did not feel disposed to make myself a party to their delinquency." Subsequent letters received by him from the factors, he declined to answer on the same grounds.

This point was made decisive of the whole case. The learned judge presiding in the court below, refused all the instructions, three in number, asked by the defendant below, and in lieu thereof, gave the following:

"That in case they find that the defendant gave the plaintiffs instructions orally to sell the cotton before any further fall in the price; and that the plaintiffs failed to do so, but afterwards, on the 16th day of November, 1865, wrote the letter mentioned in the testimony of Mr. Farrington and Mr. Feild of that date; and that Mr. Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant." (Tr., 23.)

This was simply to say that if the letter was received and not answered, there was an end of the matter. No doctrine of estoppel ever went further, and we submit with entire confidence that

the cases on this subject do not go so far. This was to take the evidence of a thing for the thing itself. The law on this point, though stringent enough, has never been collated under the head of estoppels, whither it must be transferred if this instruction stand approved.

The treatise of Justice Story on Agency, has been recently highly commended as the most valuable of all the works on jurisprudence which he conferred on the profession. It is the infirmity of all text books, however, that something must be sacrificed to brevity. Yet his language on this subject we take to be reasonably explicit; not naturally calculated to mislead, though it might be tortured into a false meaning. He says:

"In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other, to answer the same within a reasonable time; and if he does not, it is *presumed* that he admits the propriety of the acts of the correspondent, (meaning of course those detailed in the letter,) and confirms and adopts them." *Sec.* 259.

Judge Story apparently did not regard the rule with any disfavor, for he intimates that it might apply even where the relation of principal and agent never existed; that is in favour of a mere stranger or intermeddler. It is possible that it might rightfully be so applied in some extremely exceptional case, where the jury might find that the person receiving the letter intended his silence to be an acquiesence, and to be so understood by his correspondent. However we can find no such case as yet. Mr. Livermore says: "Certainly no case has gone this length, and the opinion of the great Cujas is that this is no ratification." 1 *Liverm. on Agency,* 50.

It will be observed that Judge Story says that under the circum-

stances mentioned an acquiescence will be *presumed*. A presumption is an opinion which circumstances give rise to, relative to a matter of fact which they are supposed to attend. To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential, of such a nature that as soon as the existence of the one is established, admitted or assumed, an inference as to the existence of the other arises, independently of any reasoning on the subject. It follows that an inference may be *certain*, or not certain, but merely *probable*, and therefore capable of being rebutted by contrary proof. In general a presumption is more or less strong according as the fact presumed is a necessary usual or infrequent consequence, or concurrence of the fact or facts seen, known or proved. *Domat, liv.* 9, *tit.* 6.

Legal or artificial presumptions, contradistinguished from natural presumptions are of two kinds: First, such as are of *mere law*, and, secondly, such as are to be *made by a jury*, or presumptions of *law and fact*. Presumptions of *mere law* are not always absolute and conclusive; for example the law presumes that a bill of exchange was accepted on a good consideration; but that presumption may be rebutted by proof to the contrary. Presumptions of *law and fact* are such artificial presumptions as are recognized and warranted by the law as the proper inferences to be made by juries under particular circumstances. Natural presumptions are derived wholly by means of the common experience of mankind from the course of nature, and the ordinary habits of society; and of course are always for the consideration of a jury. *Bouviers L. D., tit. Presumptions.*

In the case of *disputable* presumptions, "the law defines the nature and amount of evidence which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption." 1 *Greenl. Ev., sec.* 33.

Certainly it was not the intention of Judge Story to say that the presumption of ratification is *conclusive* in the case mentioned. A reference to the authorities there cited by him will clearly show that the reverse is true.

In *Price v. Clark*, 1 *Barn. & Cress.*, 186, a letter received by the principal on the 29th May, was passed by in silence until the 7th August. Bayley, J., said. "I am of opinion that the plaintiff's neglect to make inquiry from the 29th May to the 7th August, was evidence *to go to the jury*, to show that he acquiesced in the purchase of the sugars made by Coffin & Clark." And Holroyd, J., said: "I think therefore that the *jury might fairly infer* from the facts of this case that the plaintiff did once assent to take the cargo on his own account; or that he meant at least to take the chance of the market. They *might presume* that something had happened between the 29th May and the 7th August to alter the intention which he had once formed."

In *Bell v. Cunningham*, 3 *Peters*, 82, the court said of the question of implied ratification: "This subject was therefore very properly left to the jury."

In *Cairnes v. Bleeker*, 12 *Johns.*, 300, the law as applicable to the case was referred generally to the court, as on a special verdict.

In *Courcier v. Ritter*, 4 *Wash. C. C. R.*, 550, Washington J., said: "There are two questions for *the consideration of the jury*: 1st. Were the defendant's orders disobeyed, and if they were, does the plaintiff stand excused by the circumstances which his counsel have urged in his favor. 2d. If this point be against him, *has the defendant, by his conduct* discharged him from the legal consequences of his disobedience." And afterwards, (p. 554,) "If then the jury *should be of opinion upon the evidence*, that sales could

have been effected at the time the letter of April was written, the silence of the defendant does not amount to a ratification of the plaintiff's conduct in not selling."

The case of *Vianna v. Barclay*, 3 *Cow.*, 281, was also one where the verdict was rendered subject to the opinion of the court. The case is nowise in point. The court, per Woodworth, J., said: "I do not, however, place my opinion on the ground of acquiescence, being satisfied from an attentive examination of the testimony that the defendants (the factors) were not restricted as to price, and that the manner of effecting the sale was not, under the circumstances, objectionable." (P. 283.)

In *Norris v. Cook*, 1 *Curt. C. C. R.*, 464, only one instruction is reported; those which must have qualified it are omitted, and that reported was objected to on other grounds. The learned judge only cites the language of Mr. Justice Story, quoted above, and the cases cited in the note to the same.

In *Bredin v. Dubarry*, 14 *Serg. & R.*, 27, the court said: "The material inquiry *for the jury* was whether the act of the clerk had been disavowed as soon as the plaintiff was apprised of it," etc.

In *Richmond Manf. Co. v. Starke*, 14 *Mason C. C. R.*, 296. the plaintiffs on receiving the letter announcing the unauthorized sale by the factor, answered expressing no dissatisfaction, and drew for the amount due them, and wrote repeatedly afterwards without making any complaint. There was nothing to modify the abundant evidence of ratification, and the suit was clearly the result of an afterthought. The case has no application to this.

These are all the authorities cited by Judge Story. They show clearly what the law is and what his meaning is.

Besides, in another place in the same treatise, the matter is sufficiently explained, the learned author saying:

"When the evidence (of ratification) is doubtful, and may admit of different interpretations there it seems proper to submit the question for the decision of a jury. But where they can lend to us no safe or satisfactory conclusion, a ratification ought not to be presumed." *Sto. Agency, sec.* 253.

That the question of an implied ratification is one to be left, with all the surrounding facts, to a jury, is further illustrated by the following cases:

"We do not deny that ratification may be implied even from the silence of the principal. If I ship my cotton to my factor at Savannah, and he informs me that owing to the derangement of the currency there, the want of shipping in port, or any other cause, it will be greatly to my benefit to have the produce forwarded to New York and sold, and I do not object, he *might probably* infer my consent or acquiescence. So if one in the presence of the principal sell a parcel of goods to the latter as his agent without objection, the tacit consent of the principal will be presumed; and it will bind him. Indeed if the agent, without authority, should do any act and the principal, after a knowledge of the fact, should make no objection, but acquiesce for a length of time, *especially where such acquiescence cannot be explained, or otherwise accounted for;* and which has a tendency to mislead the agent, in all such cases, and many others which might be supposed, the law would construe such silence as contrary to the duty of the principal; and he would be bound by it." *Lumpkin, J., in Owsley v. Woolhopter,* 14 *Geo.,* 128.

In *Law v. Cross,* 1 *Black,* 539, the court, after stating the law,

very strongly in favor of the factor, say: "Whether there was such acquiescence or not the judge left fairly with the jury." In the instruction in the court below, Mr. Justice Nelson, after stating the rule in general terms, said: "This rule was essential to secure just dealings between principal and agent, but *whether this case* came within its operation, was a question for the jury." (*P.* 536.)

The case of *Evans v. Root*, 3 *Seld.*, 190, is also an authority to to show that the consideration of all such questions should be submitted to the jury.

In *Brown v. McGran*, 14 *Peters*, 493, Mr. Justice Story said of instructions of a like character: "The court refused to give these instructions; and in our opinion with great propriety; as each of them involved matters of fact in controversy before the jury upon which it was *exclusively* their province to decide." And of another instruction the court said: "One objection taken to this instruction is, that it leaves to the jury the construction of the language of the letters of the 20th of April and 24th of May. It is certainly true as a general rule, that the interpretation of written instruments properly belongs to the courts and not to the jury. But there certainly are cases in which from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real object, and intention, and agreements of the parties, are often to be arrived at only by allusions to circumstances which are but imperfectly developed." If this were so as to the interpretation of correspondence, how much more so as to a question of ac-

quiescence by an act *in pais* as here. Considering, however, that a receipt, which is an express admission, may be explained away by parol evidence, it seems to us to require no argument to show that an implied admission cannot occupy any higher ground, so as to be absolutely conclusive, as held by the court below. That the jury understood this instruction as precluding all inquiry except as to the receipt of the letter and the naked fact of the failure to answer, there can be no doubt; and that the instruction logically and peremptorily involves these premises will not admit of question.

Admitting this to be the case, it may be urged, that as the silence of defendant only made a *prima facie* case against him, what had the defendant shown to rebut the legal inference, and was there anything adduced by him sufficient for that purpose? To this we may answer briefly, that this was a question which the jury alone could legitimately pass on, and which should not have been forcibly taken from them. Many things visible and audible at the trial might have made a proper impression on them, though escaping in the recitals of the record, which after all is but the *caput mortuum* of the case.

By the authority of the great Cujas we are not to suppose that one must answer every letter by him received from anyone having a pen at his service, under penalty of legal censure and pecuniary mulct; so that offers to build houses, to accept service, petitions to obtain an office, do not necessarily impose the duty of an answer. Howsoever it may be in legal theories, in common life silence in such cases is regarded as the exact equivalent of refusal and rejection. So there are doubtless letters from agents which principals are not bound to answer, to which the agent cannot expect an answer, and to which they do not desire an answer. Especially so, if the answer might be explained away and the silence could not.

Suppose the agent should write: "I have sold your merchandize and I propose to appropriate the money to my own use;" would silence in such case entitle the agent to the money? Or suppose he should write: "I am tired of keeping your merchandize, and, by way of reducing its bulk, I propose to commit it to the flames. Please answer by return mail;" would a failure to answer a letter so expressed be a justification to the agent in the destruction of the goods? And if not, why not?

Because, we presume, that the rule in question presupposes good faith on the part of the agent. In all the cases it appeared that the agent had been under an honest misapprehension of the extent of his authority, and of the line of his duty, or was impelled to action under circumstances not originally contemplated by the parties when he had an opportunity to confer with his principal. But it will be seen hereafter that the rule has no application to any except a *bona fide* communication, and as to the good or bad faith of course the jury must be the judge. If the testimony of Feild is to have any weight, the letter of the defendants in error was in no wise written in good faith. The instructions which they had received they had flagrantly violated, and they knew it. Their conduct amounted simply to to a conversion of the goods, and they had become liable for their value. Nothing less than a subsequent agreement could change this, and they knew it. Their letter was not written honestly to advise their principal, but was tentative to get some concession by a hasty letter in reply. If this were their object their letter truly needed no reply: no more than in the cases we have supposed. Indeed the agency had expired and the factors were no longer the correspondents of their former principal. Owing to the large amount of the charges on the cotton, the factors had become the party most interested in the sale. If Feild's statement were to have any weight (and we trust that we may be allowed to say that this was a matter of which the jury

were the sole judges,) the confidential relation between the parties had ceased when the letter of November 16th was written, and they had already assumed the attitude of adversaries which they maintain to this day; and the letter was a mere manœuvre for advantage of position, in which case the application of the rule in question, based on the "confidential relationship of the parties" could only be regarded as intempestive.

We suppose that the rule under discussion, in the Roman law, whence it came, had its origin, or at least its common operation, in cases where a son (the Salique law of commerce might have excluded a daughter) borrowed money or contracted a debt on the credit of his father, and the father on being written to failed to express his dissent; in which case "the near relationship between the parties furnishes a presumption of approbation, unless there is a dissent." *Sto. Agency, Sec.* 257 *and note* 1.

Far from declaiming against the opinions of the ancients, whose opportunities of defence are limited, we may remark that many of their axioms have been exploded; and it is a little singular to observe that the silence of the *pater familias* which they took to be evidence of approbation from the fact of the relationship of the parties, has, on the ground of that same relationship, been held by an independent course of reasoning by a judge of no mean abilities, to import nothing of the kind. Thus in *Fletcher v. Dysart* 9, *B. Mon.*, 416, in a case where the fathers were charged with a note executed by their sons in their names, C. J. Marshall said: "And although they (facts from which counsel argued a ratification) may afford some ground for the inference of previous authority or consent, they are equally referable to *a natural disinclination on the part of parents to repudiate* at once, and in the absence of their sons, acts done by both under circumstances of which their fathers were not fully apprised. And especially when they expected the sons to re-

turn with the proceeds of the hogs sufficient to pay off all the purchases." Moreover the court say, what seems to be necessarily implied in all the cases on the subject, what is reasonable, and no wise repugnant to the law: "If the note was not executed with their (the fathers') assent, then, in order to render the note their note, it must have been recognized by *them with the intention of thereby making it their note*, and with a Knowledge of the Fact that without such recognition they would not be responsible. But if the recognition were made under a Mistaken Apprehension as to their liability, either as to the Fact or the Law, then such recognition would not be obligatory upon them, and the note would not thereby become their note. Testing the evidence in this case by these principles, we are of the opinion that it does not establish such recognition as they require. The recognitions relied on are indeed some of them of a negative character or rather Mere Inferences from the failure to deny responsibility. Some of the declarations proved may be referred to an ignorance of the change which had been made or attempted to be made, in the evidence of their liability—and such as were made with reference to such change do not appear to have been made with a knowledge of the facts affecting their responsibility, or with the intention to make themselves responsible."*

*The maxim that Silence implies consent must be received with abundant qualification. In actual life perhaps no sane man ever considered it as having any general application; Silence more frequently indicating dissatisfaction, anger indignation, contempt and disregard than acquiesence. Doubtless silence, even denial, may in some cases properly be considered as evidence of approbation, but then all the circumstances must be duly considered. When language, even in the hands of its greatest masters, cannot be so explicit as to preclude ambiguity, it seems like going too far to say that silence, like a term in mathematics, shall mean a certain thing, neither more nor less, which thing needs no corroboration and admits of no denial. The meaning that the silence should have affixied to it, is that which the party failing to reply believed would attach to it in the mind of the other party. *Paley's Moral Philosophy, p.* 12, *ch.* 3. *Ch. Con.* 74; 2 *Kent*, 557. The law, like every other science, continually seeks to attain precision, and of all sciences is the least capable of it. Unhappily general presumptions, if

There is one view which a jury might as we think, properly have taken of this case, and which it would have taken if allowed in which the rule as to implied assent could have no legitimate

applied as iron rules, have the disdvantage of subrogating men to intentions which they never had, to rights which they never claimed and to liabilities which they never dreamed of. Therefore estoppels are not favored.

The doctrine of implied admissions has in no wise proved a success. In the criminal law it formerly had a wide and wicked application, extending as far back at least as the proconsulship of Pontius Pilate. Standing mute not long since was *considered* evidence of guilt. *Ch.* 12, *Ed.* 1, ordains "that notorious felons, and who are openly of evil name, and will not themselves on inquest of felonies with which they may be charged before the justices at the King's suit, *Soient mys' en la prisone forte et dure,* shall have strong and hard imprisonment *come ceux qui refusent etre a la commune ley de la terre,* as those who refuse to stand to the common law of the land." "Great difference has arisen upon this provision. Some have thought that the punishment of *peine forte et dure* was ordained first by this act, and that at the common law, a felon standing mute should upon *nihil dicit* be hanged, as the law is at this day in case of treason." 2 *Reeve's Hist Eng. Law, by Finlaison, p.* 48.

It is gratifying to observe how the rigors of the common law in this respect yielded in the course of time to the gentler influences of humanity and civilization. Thus in the reign of Henry IV, ch. 8, we find the following amiable Statute :

"*Les prisonniers doivent etre mys en divers measons bases et estoppes, queils gisent par la terre touts nuds forsque leurs braces, que ils mettrait sur chacun deux tant de fers et poids quils puissent porter et plus, issint quils ne puissent lever, et quils navent ascun manger ne boire, si non le plus pier pain quils puissent trouver, et de leau plus pres al gaole, (excepte leau courant,) et que le jour quils ont pain quils nayent de leau, et e contra et quils gissent issint tanquils furent morts.*"

Which we venture to translate thus :

That the prisoners (standing mute) shall be placed in various low close houses, (dungeons in short,) and that they lie on the ground entirely naked except their pantaloons, and that there shall be placed on each of them as much iron and weight as he can carry, and more, in such manner as that he cannot rise, and that they have nothing to eat or drink except the worst bread that can be found, and the water nearest the jail, (except running water,) and that the day that they have bread they shall have no water, and *vice versa* and THAT THEY LIE THERE UNTIL THEY ARE DEAD."

So that under the common law the prisoner must speak or be hanged; under this he must speak or be tortured to death in a dungeon. But the principle was widely different. Under the common law silence was conclusive evidence of guilt as charged ; under the *St.* Henry IV the prisoner only died by reason of his

operation. A lien is said to be neither a *jus in re* nor a *jus ad rem* but a mere right to retain goods, chattels etc., until certain demands are satisfied. But the right of a factor goes beyond this; he has a special property in the goods, and for many, if not most purposes he is treated as the owner of goods consigned to him. *Sto. on Agency, Sec.* 33, 111, 112. If there was an understanding between the parties based on the advances, (which is an agreement, however expressed,) that the cotton should be sold in a few days in order to repay the advances, and the factors failed to do so, and afterwards wrote the letter of the 16th November, to which no reply was made, this circumstance has no effect on the case, any more than it would in any other case of a breach of contract. The testimony of Feild attended by strong coroborating circumstances shows that there was such a contract. He says: "On my return to Memphis, which was after an absence of three days, I obtained from the plaintiffs the advance of eleven thousand dollars, and *gave*

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contumacy, leaving the question of his guilt undecided.

Nor have efforts been entirely wanting to apply the rule of assent in criminal cases as it was applied in the case at bar, saving its conclusiveness.

In the celebrated trial of John Horne Tooke for high treason the following unique passage occurs:

"John Thompson was called to prove that he found in the prisoner's possession the resolutions from the Manchester Constitutional Society, with letters from Mr. Cooper, respecting the proposed abridgment of the "Rights of Man," all addressed to Mr. Tooke.

On Mr. Tooke remonstrating against this kind of evidence, the court said that a great number of papers might be found in possession of a man in the shape of letters directed to him; but *unless they led to answers* given by the person to whom they were so directed, they would not operate against him.

Mr. Tooke said *he never answered any letters;* and if what was directed to him was to appear in evidence against him ,there might be found among his papers a letter from a man deranged in his senses, which would subject him to a prosecution for blasphemy, as it ran thus: "Verily, verily, I say unto you that I am God the Father, God the Son, and God the Holy Ghost.'

The chief justice told the prisoner if he would argue against the strength of all the other evidence, as he did against this, he had nothing to fear from the present trial." 2 *St. Trials* 675.

them express instructions to sell the cotton within ten days, and to reimburse themselves for the money thus advanced. *The plaintiffs undertook to do so*, and as the cotton at the prices then prevailing would have brought some hundreds of dollars over the amount advanced by the plaintiffs they said that they would charge no commission for their advance." (Tr., p. 21.) The distinction on this point was very clearly set forth in the case of *Bredin v. Dubarry*, 14, *Serg. & R.*, 27. In that case the goods were placed in the hands of a clerk of the plaintiff acting for the plaintiff, who entered into a specific agreement with the defendant, beyond the scope of the authority of the clerk, but which arrangement the plaintiff was held to have ratified by acquiescence. This arrangement was made on the 16th August, 1816. On the 22nd of the following November, the plaintiff wrote to the defendant as follows: "The goods which you sent me remain subject to your order. If you wish that I should dispose of them for your account, according to the present market price, I will endeavor to do so for the best of your interest: otherwise you must give directions to some of your friends here to take charge of them. Awaiting your answer, I remain." etc.

The defendant did not answer.

On the 17th February, 1817, the plaintiff wrote him again, complaining of his silence, requesting him to remit the balance of the plaintiff's account, saying: "Otherwise I shall send your goods to public auction, and credit your account for whatever they will bring."

On the 20th December, 1818, the plaintiff wrote the defendant again, concluding as follows: "The box is in the same condition as when you sent it to me and remains subject to your order as soon as you have paid me; (that is paid by return of mail;) if not they

will be sold at public auction. This you may rest assured is my last warning, and I have put it off thus long to show you that law is always my last resource."

Accordingly, on the 13th January, 1819, the plaintiff caused the goods to be sold at auction and credited the defendant with the amount which they brought.

What the court said is this: "Now the arrangement in question was made on the 20th of August, 1816, and the first intimation which the defendant seems to have had of the plaintiff's intention to disaffirm, is found in the plaintiff's letter of the 22nd of November following, at the expiration of nearly three months. When the goods were received by the plaintiff does not appear; but it is a reasonable presumption of fact, in the absence of proof by the plaintiff to the contrary, that the clerk kept him regularly informed of all his transactions. At the period of the plaintiff's first letter, therefore, *it was too late to object.* The plaintiff had made the goods his own; *and what followed could not change a state of things which had been consumated* by the acquiesence of all parties. A merchant is entitled to an answer to every BONA FIDE proposition made by his correspondents in the usual course of their dealings; but the plaintiff had no right to treat the goods as the property of the defendant, *and the latter was, therefore, not bound to reply to any demand* in respect of them. The court then undoubtedly erred in directing the jury that on the facts in the evidence *the plaintiff had a right to sell the goods at auction as the property of the defendant,* and recover the difference."

It will be seen that the court in this case expressed what is clearly implied in every case on the subject: that in order that the letter remaining unanswered should carry with it the quality of an implied admission it must have been written in *good faith;*

and that it were vain and idle for the writer to suppose that a solemn contract could be changed unless by the joint consent of the parties, fittingly expressed, or by some evidence that by a voluntary action of the mind the joint consent of the parties were actually attained. If the rule would apply in such case, we do not perceive why it would not apply in all cases of contracts; a thing that has never been asserted. When the amount advanced and the value of the cotton are considered, when the common misunderstandings, suspicions and jealousies between consignors and their commission merchants, the paramount principle of the latter to take care of themselves, are brought into the estimate, the argument on the nearness of their relationship weighs as nothing and might be easily mistaken for a species of juridical irony. Truly there are more intimate and confidential relationships in life than this affords any example of. The contract of an architect to build a house for another, carries with it the same implications; for he too is chosen for his fitness for the matter in hand, and his general integrity; the materials he is expected to buy at no more than the market price; the workmen he employs are expected to come up to the usual standard for skill, carefulness and diligence; the whole business is one of which he is supposed to possess an especial knowledge; and the employer must usually rely on him for its general conduct and management. Yet we have never seen that a contract of that kind is taken to be changed by every letter written by the architect to which the owner makes no reply.

Further, we contend that the instruction given by the court contains another infirmity, which is pointed out in the third instruction asked by the defendant and refused by the court. It would seem from the instruction actually given that the failure of Feild to answer the letter of the factor of the 16th November, was

an act of such immeasurable delinquency that it placed him under some prodigious commercial ban, which gave to the factor a complete *carte blanche* in the premises. They retained the cotton on a falling market nearly a year: they might have retained it for an indefinite period. It would seem that all the obligations of duty resting on them were forever annulled; and the situation contained in it no other significance than that Feild should pay the advances, by an individual liability not contemplated in truth by either party at the time that the advancees were made.

Admitting that the failure of Feild to answer the letter must be construed into an acquiescence in its contents, we may certainly be allowed to inquire to what extent he was bound thereby. We presume that such an implied admission could not have any greater operation than an expressed assent; no greater, for example, than if Feild had written: "I have received your letter, and approve of your course." What was the course which would be thereby indicated? The letter of the 16th November was in effect that if Feild did not ship more cotton or remit a margin in cash the factors would sell the cotton. Placing the case in the attitude which it would occupy by the testimony of Farrington himself, the factors had a discretion as to the time of selling. The letter indicated in what manner under the circumstances the discretion would be exercised; that is a reasonable time would be given for the shipment or remittance, in default of which the sale would be made. The admission must be co-extensive and co-terminous with the proposition, and cannot be construed to have any larger operation without manifest injustice. If the admission is to bind Feild, the letter must also bind the factors. Taking the version of either Feild or Farrington, taking them both together, leaving them both out of the question, the silence of Feild could import nothing

more to the factors, to anyone, than a simple assent to the proposal made; as if he had said in words: "You say that under certain conditions you will sell; I do not object; proceed under those conditions to sell." If they failed to sell in a reasonable time after the conditions attached—a question for the jury—themselves were derelict to that extent; and Feild should not thereby suffer; unless indeed the court will assess him with exemplary damages; and this, we submit, is not a case for that.

In the second instruction asked by the defendant the word "not" is interpolated in the transcript in the third line from the bottom of the paragraph. We have not had an opportunity of comparing it with the record. The error is however palpable. See copy of agreement of counsel at the end of this brief.

That instruction was based on the case of *Brown v. McGran*, 14 *Peters*, 479, which we consider as simply an extension of the same principle recognized by the Supreme Court of Pennsylvania in the case of *Bredin v. Dubarry, ubi sup.*, there being an express contract in the latter case, and this court holding substantially in the former that a contract is implied from the nature of the transaction. In the case of *Brown v. McGran*, the latter shipped cotton to Brown & Co., in Liverpool. The cotton cost $9,151.77, and Brown & Co. accepted for $9,000. The cotton was consigned without instructions, and arrived at Liverpool about the 9th April, 1833. On the 20th April McGran wrote to the Liverpool house not to sell the cotton until they heard from him again, and they answered on the 24th May, saying: "We are in possession of your esteemed favor of the 20th ult., and your wishes in respect to the cotton we now hold on your account are noted accordingly." On the 22d July McGran wrote, advising the factors to sell the cotton soon after unless they were of opinion that they could do better by holding a little longer. On the 7th June, 1833, Brown

& Co. informed McGran of the sale of the cotton. At this time the acceptances constituting the advances were not due by about sixty days. McGran on receipt of this information wrote to Brown & Co., complaining of the violation of his instructions contained in his letter of the 20th April. Brown & Co. replied justifying their course by the fact of their paramount interest in the cotton, and the alleged insolvency of McGran. Story, J., in delivering the opinion of the court, said:

"The instruction in effect, decides that in the case of a general consignment of goods to a factor for sale, in the exercise of his own discretion as to the time and manner of sale, the consignor has a right, by subsequent orders, to suspend or postpone the sale at his pleasure; notwithstanding that the factor has, in consideration of such general assignment, already made advances, or incurred liabilities for the consignor, at his request, trusting to the fund for his due re-imbursement. *We are of opinion that this doctrine is not maintainable in point of law.* We understand the true doctrine on this subject to be this: Whenever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, *if no advances have been made* or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to re-imburse such advances or meet such liabilities; unless there is some existing agreement between himself and the consignor which controls or varies this right. Thus, for example, if, contemporaneous with the consignment and advances

or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to re-imburse his advances or liabilities until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; when, indeed, the consignor shall, after due notice and request, refuse to provide any other means to re-imburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon; if the consignee stands ready and offers to re-imburse and discharge such advances and liabilities.

"On the other hand, when the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale, and the *consignor has no right by any subsequent orders* given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the re-imbursement of such advances or liabilities."

This case was approved in *Blot v. Boiceau*, 3 *Comst.*, 82.

In the case of *Parker v. Branker*, 22 *Pick.*, 45, the court, per Wilde, judge, said: "The jury were instructed 'that a commission merchant, having received goods to sell at a certain price,

and made advances upon such goods, has a right to re-imburse himself by selling such goods at the fair market price, though below the limit, if the consignor refuse upon application and after a reasonable time to repay the advances.'

"The rule of law thus laid down appears to the court to have been stated with perfect accuracy, and with all the qualifications which are applicable to the defendants' right of sale, as claimed by them on the evidence.

"The law appears to be well settled, both in England and this country, that the pledgee of personal property, after the debt becomes due, may sell without a judicial process and decree of foreclosure upon giving reasonable notice to the debtor to redeem. * * * * * The principle thus settled seems to be founded in good sense, and may be essentially necessary to enable the pledgee to avail himself of his pledge, in a reasonable manner, for the discharge of his demand.

"In the present case the defendants were not merely pledgees, but they were expressly authorized to sell the property consigned to them, and thereby to re-imburse themselves for their advances. There was no time limited in which the sale was to have been made. The defendants were, therefore, bound by the acceptance of the consignment, to wait a reasonable time, if the sale could not be made for the price limited, although by the delay their security might be impaired.

"But after such a reasonable time had elapsed, and a demand had been made upon the plaintiff to repay the money advanced, and he had refused to do so; he had no further power, by any principle of law or justice, to control the defendants' right of sale to their prejudice."

It is evident by this authority that after the demand made on

Feild by the letter of November 16th, and his failure to repay the advances, the matter passed entirely beyond his control; if there were no previous contract between the parties the factors would be compelled to sell in a reasonable time or in a reasonable manner, as would be for the best interests of the consignor. Farrington says that the cotton was left to be sold at their discretion. What kept it from being sold for nearly a year? The answer is the failure of Feild to answer the letter. But these authorities show that despite the failure to write, despite any letter which Feild could conceivably have written, the factors still had the discretion to sell. The second instruction only sought to make them liable for an abuse of that discretion; and ought to have been given.

A power in the consignor to control the sale under such circumstances, the court say in the case last cited, "would be inconsistent with the *understanding of the parties* as it must be presumed to have been when the advances were made; and it would enable the plaintiff to impair the defendant's security at his own will and pleasure for an unlimited time, if he were disposed so to do."

See also as to the same point *Frothingham v. Everton*, 12 *N. H.*, 239.

The case of *Brown v. McGran*, has been held in England, in the case of *Smart v. Saunders*, 5 *Manning, Scott & Gr. R.*, 895, not to be law in that country, which is no doubt dependent on different usages of trade; but there is no question we presume of its authority in this country.

On a calmer deliberation than a trial at the assizes will usually tolerate, we feel hopeful that the judgment below will not stand as the proper conclusion of the matter. The disposition of the con-

troversy, compendious enough to be startling, impaling the defendant on a sharp point of the law, precluding inquiry where there were so many important facts requiring, in the interest of common justice, to be scrupulously weighed and tried, cannot be reconciled with any reported case, and cannot, on reflection, commend itself as a precedent to the court; at least so long as every merchant is not compelled to seek legal advice as to every separate act of his life; nor can it be satisfactory to the court to perceive that a case naturally involving so many inquiries, has been done to death on a bare estoppel. Respectfully submitted,

WATKINS & ROSE,
For Plaintiff in Error.

COPY OF AGREEMENT OF COUNSEL ON FILE IN THE CAUSE.

SUPREME COURT OF THE UNITED STATES.

William H. Feild, Plaintiff.

vs.

Farrington & Howell, Defendants.

The undersigned, counsel herein, agree and admit that the word "not" in the third line from the bottom of the second instruction asked by the defendant on p. 22 of the transcript, is an error in copying or printing, and is to be considered as expunged.

WATKINS & ROSE, For Plaintiff.
A. H. GARLAND, For Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1869.

WILLIAM H. FEILD,

vs. [No. 243.

FARRINGTON & HOWELL.

In Error to the Circuit Court of the United States, for the Eastern District of Arkansas.

ARGUMENT FOR DEFENDANTS IN ERROR.

GAZETTE PRINT, LITTLE ROCK, ARK.

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1869.

WILLIAM H. FEILD,

vs. [No. 243.

FARRINGTON & HOWELL.

In Error to the Circuit Court of the United States, for the Eastern District of Arkansas.

ARGUMENT FOR DEFENDANTS IN ERROR.

GAZETTE PRINT, LITTLE ROCK, ARK.

ARGUMENT.

Farrington & Howell sued William H. Feild in the Circuit Court of the United States, for the Eastern District of Arkansas, in assumpsit, for the sum of six thousand six hundred and ninety-five dollars and seventy-five cents, as appears by the bill of particulars of the demand. Upon pleas of general issue and recoupment, the case was tried, and verdict and judgment rendered for Farrington & Howell for the sum of $5,690.24. During the trial, Feild saved some exceptions and after bill of exceptions, properly presented, he prosecuted a writ of error.

The bill of exceptions is substantially as follows:

I know the plaintiffs to this suit, but I do not know the defendants. From June 19th, 1865, till September 20, 1866, I was employed by Farrington & Howell as cotton-warehouse clerk, and since September 20, 1866, till the present time, and am still employed by Farrington & Howell as their book-keeper. The forty-seven bales of cotton mentioned in the bills of lading, marked Exhibit No. 8 and Exhibit No. 9, to the deposition of William M. Farrington in this case, were received on the 10th of October, 1865, by me as cotton-shed clerk in Farrington & Howell's cotton warehouse. The marks on the cotton agreed with the marks in the bills of lading, and the cotton remained there; that is, in the cotton warehouse aforesaid, up to the time it was sold to J. B. Starke, broker, for James Brown. The said sale was negotiated on the 12th of September, 1866, and was completed on the 15th of

September, 1866, when the cotton was paid for and delivered. The account of sales, to which Exhibit 6, to deposition of William M. Farrington, before referred to, is a true copy, was rendered to the defendant on the 17th day of September, 1866. The account of sales was sent to the defendant by mail at Little Rock, Arkansas. I attended to the weighing of the cotton, and watched the examination of it by the purchaser. The account of sales shows the true weight of cotton, and the weights by which the purchaser settled. I knew the price the purchaser agreed to pay for the cotton; the agreement was that the purchaser should pay 30 cents per pound for forty-four bales, and 25 cents per pound for three bales, but the contract was made subject to examination by the purchaser before payment, as all sales of cotton in this market are. Upon examination several of the bales were found to be mixed, repacked, and old, damaged, and a majority of the bales had cotton seed scattered through them. After the purchaser had ascertained the condition of the cotton, he reported the facts to the office of Farrington & Howell, and demanded a reduction on 14 bales of the cotton from the price agreed on. To effect a sale a reduction of five cents per pound on 14 bales was finally allowed, and then the sales stood thus: 33 bales at 30 cents per pound, and 11 bales at 25 cents per pound, and three bales at 20 cents per pound. This is a statement of sales as shown by the account of sales before referred to. The cotton was in the same condition when sold as it was in when received, having been stored in a dry warehouse all the time; the cotton received no injury while in the warehouse. The true character of the cotton, as described above, could not be discovered till the bales were bored and examined.

I was acquainted with the prices of cotton in this market at the time of the sale of the cotton above mentioned, and I consider that the said cotton was well sold; the reduction was necessary and proper on the 14 bales, and such as the purchaser had a right to demand. The returns of the cotton, as shown by the account of sales, are all that could have been realized from the cotton in this market at that time. The items of charges and expenses, as enumerated in the account of sales, are correct, and such as are cus-

tomary in this city and were at that time. The repairs were rendered necessary on account of the condition of the cotton when it was received; many ropes being off, and the heads of the bales being out, and in all cases it is necessary for the seller of cotton to put the bales in good order before the cotton is paid for and received by the purchaser. The net proceeds of the cotton were placed to the credit of the defendant, on the books of the plaintiffs, as is shown by Exhibit No. 7 to the deposition of William M. Farrington before referred to. The said Exhibit No. 7 was taken by me from the books of the plaintiffs, and the balance shown to be due the plaintiffs is the true balance as shown by the plaintiffs' books; shortly after the conclusion of the sale of the cotton, a person representing himself to be the brother and agent of the defendant, in respect to the cotton, came into the office of the plaintiffs, and said that shortly before he had left Little Rock, the defendant had received advices of the sale of the cotton, but had not received an account of sales; this person said that his brother, the defendant, instructed him to call and inquire about the cotton, and asked to see the cotton, and said he had himself marked some of the bales, and would readily recognize them. He was told by Mr. Farrington, one of the plaintiffs, that the cotton had been sold and delivered to the purchaser, and had probably been shipped, but that he would send down and see if the cotton had been shipped by Mr. Farrington's direction. I went to Mr. Brown, the purchaser, and learned that the cotton had been shipped. When I repeated this to the party representing himself as the brother of the defendant, he said that he was going to Boston, and wished to learn the house the cotton was shipped to, and that he would see it there. The conversation between this man and Mr. Farrington was such as indicated that the sale was not satisfactory to the defendant; whereupon Mr. Farrington proposed to him to re-purchase cotton corresponding with the samples of the defendant's cotton, and place it subject to the defendant's order if he would pay the balance due the plaintiffs, which he declined doing.

LORENZO S. LAKE.

I am a member of the firm of Farrington & Howell, merchants of Memphis, Tennessee, who are the plaintiffs in this suit. On or about 9th October, 1865, we received forty-seven (47) bales cotton from W. H. Feild, of Little Rock, Arkansas, the defendant; at the time the cotton was received, Mr. Feild was in Memphis, perhaps came on the same boat with the cotton, and directed it to be put on the market, but he went to the country, and telegraphed us from Moscow, 10th October, as follows:

"Do not sell my cotton 'til I see you." The dispatch is herewith filed, marked Exhibit No. 1, and asked to be taken as a part of this deposition. The dispatch is signed A. Feild; but when Mr. W. H. Feild returned I showed it to him, and he acknowledged it to be his. The market was excited, and cotton, on the day of Mr. Feild's dispatch, was higher than the day of its receipt. He returned to this city from the country, and was on his way to the eastern cities for the purpose, as I now recollect, to buy goods, and wanted all the money he could get; at his request we advanced him eleven thousand dollars in cash. He left the cotton to be sold at our discretion, but expressed great confidence in high prices being maintained. My recollection now is, that he said he would have other cotton coming to us on his account, and went with me to see several insurance men as to the rate of premium on cotton shipped out of the Arkansas River. Several weeks afterwards he returned from his trip to the eastern cities, on his way home, and approved of our course in not selling his cotton; and said he would appreciate and remember it in the future. I do not think the market was so active, nor prices as high, as when Mr. Feild got the eleven thousand dollars from us.

We received no letter from Mr. Feild after he got the money from us, although we wrote him, November 16th, 1865, requesting an answer. We stated we had held his cotton to meet his views, and the declining tendency of the market induced us to write him. A copy of this letter is herewith filed, marked Exhibit No. 2, and asked to be made a part of my deposition. I will also state that we received no remittance of money or shipments of any kind (except the 47 bales cotton) from Mr. Feild, nor did we hear from

him, either directly or indirectly, about his cotton, or anything else, until after we advised him of the sale of his cotton, when his brother, acting for him, called to see us. This was in September, and about ten days after the sale of the cotton. I cannot state with certainty the precise date, but think somewhere between the 20th and 25th September, 1866. He acknowledged that his brother had received the letter advising the sale of cotton, but had not had time to receive one of the 7th, inclosing account sales and our account current. I mention this to fix, as near as I can, the date W. H. Feild's brother, acting for him, called to see me. We wrote to W. H. Feild on 8th August, 1866, and herewith file a copy of our letter, marked Exhibit No. 3; this letter will explain itself. As we had received no answer to our former letters, we inclosed this one to S. H. Tucker, Esq., of Little Rock, with the request for him to deliver it to Mr. Feild, and advise us. On 18th August he wrote us that the letter had been delivered to W. H. Feild.

In each of the letters referred to, we advised Mr. Feild of the downward tendency of prices, and asked him to let us know his views; we also advised him of the state of the market. Mr. Feild was always represented to us as entirely solvent and abundantly able to pay his debts; and we wished him to follow his own views about the sale of his cotton. After having written Mr. Feild as before stated, and not having heard from him, we sold his forty-seven bales cotton on 13th September, 1866, and advised him the same day of the sale. A copy of our letter is herewith filed marked Exhibit No. 4. I am well satisfied that all these letters had been received by Mr. Feild; I might say that the proof is almost positive of that fact. Letters to other parties in Little Rock, sent by the same mail as our first letter, were duly acknowledged; another, enclosed to Mr. Tucker, was delivered to Mr. Feild; and the third, advising the sale of the cotton, was acknowledged by Mr. Feild's brother, while acting as his agent, in talking to me about the sale of the 47 bales cotton. In addition to this, W. H. Feild's agent (in the person of his brother) stated to me (in the presence of our book-keeper, Mr. Lake) that the letters had all

been placed in the hands of Judge Watkins, his brother's lawyer; I never saw W. H. Feild's brother but once, as I now recollect. and it was then when acting for W. H. Feild, he wished to see the cotton. I asked him his object; to which he replied that he marked the cotton, or a part of it, and would recognize it at once. He stated that it was his brother's directions for him to examine the cotton. I told him the cotton had been paid for and delivered, but that I would go with him to see Mr. Stark (the agent or partner of Mr. Brown,) who bought the cotton, and if it had not been shipped off, no doubt he could see it. We found Mr. Stark, who informed us that the cotton had been shipped to Boston. Feild said he would be in Boston about the time the cotton reached there; and would like to see it; and asked Stark for the name of the party to whom [to whom] the cotton was shipped, which Stark gave him. I think Feild wrote the name of the consignee down, and put it in his pocket. This conversation was in my presence.

Mr. Feild afterwards returned to my office, and wrote a letter about the cotton to his brother, the defendant, at Little Rock, which he read me. I informed him in this interview, which must have been fully ten days after the sale of the cotton, that if the sale was not satisfactory, I could get the sample and would furnish him with the same quality of cotton at the same price, if he would pay us his account. I made this proposition to him as the agent of his brother, W. H. Feild, and he declined it.

I must state that upon delivery and examination of the 47 bales cotton, 14 bales were rejected by the purchaser, in consequence of being mixed, repacked, old and damaged. We examined the cotton carefully, and found it as represented; and to make the sale, we had to submit to a reduction of five cents per pound on the rejected cotton; which left the sale as follows: 33 bales at 30c.; 11 bales at 25c.; and 3 bales at 20c.; and advised W. H. Feild of this, 17th September, by letter, a copy of which is herewith filed, marked Exhibit No. 5. We sent him at the same time account of sales of the 47 bales of cotton, a duplicate copy of which is

herewith filed as a part of my deposition, and marked Exhibit No. 6.

I also file our account current with Mr. Feild, marked Exhibit No. 7, which I likewise wish to make a part of my deposition.

Exhibit No. 6 shows the actual weights of the cotton, the marks, time of sale, price, to whom sold, and the various items of charges and expenses, and the net proceeds of the cotton. Exhibit No. 7 shows the money advanced, with six per cent. per annum interest on the same; and, after deducting the net proceeds of the cotton, shows a balance in cash due Farrington & Howell, the plaintiffs, on 15th September, 1866, of the sum of $6,695.74 from the defendant, W. H. Feild.

I also file herewith, as a part of my deposition, the bills lading, showing the marks and number of bales cotton received by Farrington & Howell from W. H. Feild. Bill lading per steamer "E. O. Stanard" for 45 bales cotton, dated 5th October, 1865, marked Exhibit No. 8; and bill lading by steamer "Zephyr," October 6th, 1865, for two bales, marked Exhibit No. 9. The business of Farrington & Howell, the plaintiffs, is conducted by both parties in a systematic manner, and aided by competent clerks and employees; all papers, dispatches, letters, and bills lading are carefully filed away; and copies of all letters, account sales and dispatches of importance, taken by a copy press from the original transaction.

I have charge of sales of cotton, and a general supervision of everything which relates to that department, as well as directing and controlling the monetary affairs of the business. The price realized for the cotton, as shown by Exhibit No. 6, was the best that such cotton was realizing in this market at that time; the samples were shown to other buyers, and no one offered as much as the price Mr. Starke paid. The cotton was sold at the time above stated, because Farrington & Howell had despaired of hearing from Mr. Feild, who appeared to them to have abandoned the cotton, and to have had no intention of assuming the control of it or of paying them the amount he owed them.

The cotton was incurring additional expenses and charges every

day, and the general tendency of the market was downward. In addition to this, it was the season when the new crop would be thrown into market. The various letters of Farrington & Howell, which I have referred to and filed as exhibits, show that they held up the cotton because they understood Mr. Feild to wish it to be held for better prices. I repeat that I had charge of the cotton department, and I had but one wish, and that was to act in a manner that would be satisfactory to Mr. Feild. I had other customers who thought the price of cotton would go higher, and the cotton is still in our warehouse, and was on hand even before we received Mr. Feild's cotton. I profess to use great diligence to obtain the value of all cotton that I have to sell, and so acted with this particular lot. Mr. Feild was well aware that his cotton had not been sold, and could have had it sold any day after its arrival in Memphis; a word from him would have been sufficient; the letters which we wrote him show that beyond doubt. All the charges made in the account, as per Exhibit No. 6, are just and correct, and are such as were usually made by commission merchants in this city at the time; and the expenses charged were actually incurred and were necessary, and are such as were usual in this city at the time.

According to custom we were entitled to $2\frac{1}{2}$ per cent. commission for the advance made, but we did not charge it in this case, as the account current herewith filed will show. In explanation of that part of my deposition on page 4, which relates to the sale of 47 bales cotton, I again refer to our letter of 12th September, marked Exhibit No. 4, which says:

"We have sold your 47 bales cotton, as follows:
44 bales at 30, and
3 " " 25, subject to examination upon delivery. We had all the buyers in the market to see the samples, and we feel authorized to say we sold at the highest price in the market."

Now, it will be seen by reference to our letter, 17th September, which is referred in this deposition as Exhibit No. 5, that, upon delivery of the cotton, 14 bales were rejected in consequence of being mixed, repacked, and old, damaged; and to make a sale we

had to submit to a reduction of five cents per pound. That is to say, that the 3 bales which were sold at 25 cents were reduced to 20c.; and 11 bales out of the 44 bales which were sold at 30c., were reduced to 25; the sale then stood as follows:

33 bales at 30.
11 " " 25.
3 " " 20.

This is the correct statement of the prices at which Farrington & Howell sold the above 47 bales cotton; and the account sales, which is filed as Exhibit No. 6, shows that the same figures were returned to Mr. W. H. Feild, and the net proceeds placed to his credit.

On 17th September, 1866, Farrington & Howell, the plaintiffs in this case, advised W. H. Feild, by letter and account current, that he owed them $6,695.74, for which they had drawn on him, in favor S. H. Tucker. Mr. Tucker advised us that Mr. Feild refused to pay the draft, and returned it unpaid to us.

WM. M. FARRINGTON.

I am a member of the firm of Stratton, Goyer & Co., doing business in this city, and have been so connected since the 1st of October last. Prior to that time, from the 1st of April, 1865, I was in the employ of Farrington & Howell, of this city, as bookkeeper. In the early part of October, 1865, Mr. W. H. Feild, of Little Rock, Arkansas, shipped them forty-seven (47) bales cotton. He either came on the same boat with the cotton, or arrived in the city about the same time. In order to ascertain the price his cotton would bring, he desired it should be put on the market, but with instructions not to be sold. Mr. Farrington, who is cotton salesman of the firm, did so, but not getting an offer suitable to Mr. Feild's view, he was not willing his should be sold then; but he (Feild) being on his way north, he desired an advance on his cotton; and being represented as a gentleman of means and reliability, eleven thousand dollars ($11,000) was given him by me, the receipt of which is attached herewith and marked Exhibit No. A. The inducement to make this large advance (besides Mr. Feild's recommendations of integrity and solvency) was his inti-

mations of shipping more cotton, as he, in company with Mr. Farrington, went around to the insurance company to try and get the rate of marine insurance reduced from Little Rock to this place on his cotton. He left the cotton discretionary, but was an advocate of higher prices, as a majority of the customers were. Fully desiring to carry out Mr. Feild's views, and extremely anxious of benefitting him in the best possible manner, the cotton was not sold. The price depreciating, Mr. Farrington suggested to me the propriety of selling Mr. Feild's cotton, but I thought it best to suggest the same to Mr. Feild, in order that his wishes might still be our guidance.

Not hearing from him, a second letter was written, and a third one. With the third one, I wrote one myself to Mr. S. H. Tucker, of Little Rock, a reliable and prominent banker of that place, asking him to deliver the letter personally to Mr. Feild, in order that we might certainly know of his hearing from us. This letter was delivered, as Mr. Tucker acknowledges. Still not hearing from him, and with no prospects of it, the cotton was sold in September, 1866, and the very best possible price at that time was obtained. The account sales were made up by myself, then still in the capacity of book-keeper for Farrington & Howell, and the charges were just and legitimate. I cheerfully add to this, that whilst in the employ of Messrs. Farrington & Howell I found them diligent and prompt, zealously guarding the interests of every one entrusting any business to their care.

I mean by Farrington & Howell, the plaintiffs in this suit, and by W. H. Feild, the defendant. The telegram marked Exhibit No. 1, to the deposition of W. M. Farrington in this case, was received by the plaintiffs about 10th October, 1865. Exhibit No. 2, to deposition of W. M. Farrington in this case, is a copy of the letter written at my suggestion. Exhibit No. 3, to deposition of W. M. Farrington in this case, is a copy of the letter written at my suggestion. Exhibit No. 4, to deposition of W. M. Farrington in this case, is a copy of the letter written by the plaintiffs to the defendant, announcing the sale of cotton. Exhibit No. 6, to deposition of W. M. Farrington in this case, is a copy of the account sales of the forty-seven bales cotton sent the defendant; the orig-

inal was made out by myself. The account sales shows the true weights and real price for which the cotton was sold. The account sales shows the charges and expenses. The 2½ per cent. commission was, at the time the sales were made, the customary charge in this market. Exhibit No. 7, to the deposition of W. M. Farrington in this case, is a copy of the account current made for the plaintiffs by me, or under my supervision, and sent to the defendant. Exhibits No. 8 and 9, to the deposition of W. M. Farrington in this case, are the original bills lading of the forty-seven bales cotton. The cotton was sold, subject to examination by the purchaser, and, when examined, fourteen bales were rejected for being mixed, and a reduction in price had to be submitted to in order to effect the sale.

JAMES H. McDAVITT.

I am now, and was in October, 1866, a cotton broker in the city of Memphis. I was then, and am now, familiar with the prices of cotton in this market, being almost constantly in the market. In the latter part of August, and early in September, 1866, the plaintiffs offered to sell me, according to the samples shown me, a lot of forty-seven bales of cotton, marked W H F. Cotton is sold in this market by the sample, and it is the understanding that the cotton in the bales must correspond in quality with the samples:—44 bales of the cotton, as indicated by the samples shown me, ranged from good ordinary to low middling, and three bales were low ordinary. Within the period above mentioned, I frequently offered 29 cents round for the 47 bales, understanding that it corresponded with the samples. I considered that I offered the full value of the cotton. Plaintiffs asked 30 cents per pound for it, which I refused to give. On the day the plaintiffs sold the cotton I offered 29½ cents round for it, but later in the day the plaintiffs sold 44 bales of the cotton for 30 cents per pound, and three bales for 25 cents per pound. I considered the sale at the time a tip-top sale, and so expressed myself to the plaintiffs and the buyer. It is customary in this market, after a sale is made by samples, for the buyer to examine the bales, drawing samples from the centre of the bale as well as from the edge,

and in case the quality of the cotton drawn from the centre of the bale proves inferior to that drawn from the edge of the bale, it is optional with the purchaser either to reject such entirely or agree with the seller about the proper reduction in price, it being entirely at the option of the purchaser to reject or take such cotton as may prove to be mixed in quality.

WM. A. GOODWYN.

I know the plaintiffs to this suit, but I do not know the defendant. On the 12th of September last, as agent for Janes Brown, I purchased of the plaintiffs 47 bales cotton:—marked W H F, 43 bales; W H F, 3 bales; W H F, 1 bale. The purchase was of

BOB

44 bales at 30 cents per pound, and 3 bales at 25 cents per pound, bought subject to examination upon delivery. Upon examination of this cotton I found 14 bales of it repacked, mixed, and old, damaged; and I went at once to Mr. Farrington, one of the plaintiffs, and informed him of this fact, and that I could not pay him for the cotton unless the price of these bales was reduced to their real value. I had bought the cotton by the samples, as is customary in this market, and found the bales contained inferior cotton to that the samples represented. I also found cotton seed in nearly all of these bales, which appeared as if there had been some defect in the ginning, or great carelessness in the packing or baling of the cotton. These defects in the cotton could not have been discovered without an examination of the bales. Examination is made by boring with a cotton auger to the centre of the bale and pulling out samples. I was well acquainted with the prices of cotton in this market at that time. I considered at the time of examination, and still think, that 11 bales were worth not over 25 cents per pound, and 3 bales over 20 cents per pound; the last mentioned 3 bales were the 3 bales originally sold at 25 cents per pound. This is all that I would have paid for the cotton, nor do I think any other buyer in the city would have paid more. I know this lot of cotton was offered to other buyers, as I saw them looking at the samples on the tables in the cotton office of the plaintiff. A person representing himself to be the brother

of the defendant called on me, in company with Mr. Farrington, one of the plaintiffs, a few days after the purchase of the cotton, and asked me what I had done with the cotton. I told him I had shipped it to Messrs. Jenkin Bro. & Chipman, Boston, Massachusetts. I think I gave him the name of the street in Boston in which the consignees did business, and he took a memorandum of the fact. I also informed him that the cotton was not shipped in the original mark, and I gave him the mark in which it was shipped. My recollection is, he said he was going north and he said he would see the cotton. The price I paid to the plaintiffs on final settlement was as follows:

33 bales, at 30 cents per pound.
11 bales, at 25 cents per pound.
3 bales, at 20 cents per pound.

J. B. STARKE.

Exhibit No. 1.

U. S. MILITARY TELEGRAPH, Oct. 10, 1865.

By telegraph from Moscow, 10, 1865.
To Farrington & Howell:

Do not sell my cotton till I see you.

A. FEILD.

9 Ge 50 pd.

Exhibit No. 2.

FARRINGTON & HOWELL, COTTON FACTORS,
GROCERS AND COMMISSION MERCHANTS,
Memphis, Nov. 16th, 1865.

W. H. FEILD, Esq., *Little Rock:*

DEAR SIR: We have not sold your cotton, as the market has been dull and on the decline every day since you left. The dispatches from New York yesterday quote middling cotton about 50c, and very dull. The public dispatches quote 50@51c., while the private give 49@50c. Your cotton would not, in the present market, sell here for over 43@44c. As the money market is very tight, we will be compelled to sell your cotton unless you make other shipments or remit us as a margin in cash.

We have held on thus far to meet your views, but the declining tendency of the market induces us to write this letter. Please to let us hear from you on receipt.

Very truly your friends,
FARRINGTON & HOWELL.

Exhibit No. 3.

FARRINGTON & HOWELL, COTTON FACTORS,
GROCERS, AND COMMISSION MERCHANTS,
Memphis, Aug. 8th, 1866.

W. H. FEILD, Esq., *Little Rock, Ark's:*

DEAR SIR: We have been much astonished at not hearing from you in regard to your cotton. We wrote you on the subject, and requested a reply, but have heard nothing from you. By the same mail we wrote to other parties in your city, and we received due acknowledgment. This was many months ago, date not recollected. When you left your cotton here you were not satisfied with the market, although that was about 50c. When you returned from the northern cities you approved of our efforts to promote your interest, and that the cotton had not been sold. The price has greatly declined, and the expenses have been going on.

Now let us hear your views. The cotton will not pay your account, as you know, and we ask you to remit us for the balance. According to the present market the cotton would be well sold at 32c., including internal revenue. We have now waited to meet your views until it is necessary for something to be done. Will you please write us on receipt of this, for we are anxious to hear from you? Very respectfully,

FARRINGTON & HOWELL.

Exhibit No. 4.

FARRINGTON & HOWELL, COTTON FACTORS,
GROCERS, AND COMMISSION MERCHANTS,
Memphis, Sept. 12th 1866.

W. H. FEILD, Esq., *Little Rock, Ark's:*

DEAR SIR: We wrote you some time ago that we would sell your cotton unless we heard from you, with a remittance.

An improved demand exists to-day, and we have sold your 47 bales, as follows:—44 bales at 30c.; and 3 bales at 25c.; subject to examination upon delivery. We have had all the buyers in the market to see the samples, and we feel authorized to say we sold at the highest price in the market. We will send account sales and account current so soon as we get through with the delivery.

Very respectfully,

FARRINGTON & HOWELL.

Exhibit No. 5.

[Copy.]

Memphis, Sept. 17th, 1866.

W. H. FEILD, Esq., *Little Rock, Ark's:*

DEAR SIR: We wrote you the 12th, advising sale of your cotton, 44 bales at 30, and 3 bales at 25, subject to examination. Upon delivery of the cotton, 14 bales were rejected, in consequence of being mixed, repacked, and old, damaged. We examined the cotton carefully, and found it as represented; and, to make a sale, we had to submit to a reduction of 5 cents per pound on the rejected cotton, which left the sale: 33 bales at 30c., 11 bales at 25c., and 3 bales at 20c.; and we hand enclosed account of sales for the 47 bales, at these prices. No doubt, the sale will appear low, but it could not be duplicated at the same price to-day.

We also hand enclosed your account, showing balance due us, $6,695.74; and we have drawn on you this day for this balance, in favor of S. H. Tucker, which please pay.

Very Respectfully,

FARRINGTON & HOWELL.

DUPLICATE.—*Sale by Farrington & Howell, No. 268 Front street, Memphis, of 47 bales cotton, to James Brown, for account of W. H. Feild, Esq.*

Sept. 12, 1866.

W H F	1	-	-	493		
W H F	1	-	-	400		
				491		
				——	1,384, *a* 20c. -	276 80 [Over.
					Over -	276 80

W H F	1	- -	413	505	
BOB					
W H F	1	- -	480	478	
W H F	9	- -	385	476	
			447	422	
			490	538	
			457	2,419	
			2,672	2,672	
	11 bales	- -	5,091, *a* 25c.	- -	$1,272 75
W H F	1	- 469	506	445	
W H F	32	- 438	490	522	
		490	461	543	
		509	448	494	
		413	470	477	
		429	501	402	
		436	486	554	
		512	491	493	
		503	468	512	
		458	362	469	
		486	541	345	
			5,224		
		5,143	5,143		
			5,256		
	33 bales	- -	15,623, *a* 30c.	-	$4,686 90
					$6,236 45
Off for 1 light		- - - - - -			1
					$6,235 45

Charges:

Freight and charges boat, - - - -	$129 75	
Drayage, - - - - - - - -	11 75	
River insurance, 1½ per cent on 200, per bale,	141	
Fire insurance, 6 mos., on 200 per bale, 376		
5 " " 150, " " 255 56		
	631 56	
Government tax on sales, 1–10 per cent -	6 23	
Storage, 152 75 - - - - - -	152 75	
Repairs, - - - - - - - -	81 75	
Commissions, 2 1-2 per cent., on $6,235 45	155 89	
		$1,310 68
Net proceeds - - - - - -		$4,924 77

MEMPHIS, TENN., *September 15th*, 1866.

Exhibit No. 7.

W. H. Feild, in account with Farrington & Howell.

1865.	DR.		
Oct. 13.	To cash, as per y'r receipt, - -		$11,000 00
1866.			
Sept. 15.	" interest on $11,000, 11 mos.	$605 00	
	" " " freight and drayage, river insurance, 282 50, 11 mos., - - - -	15 51	
		$620 51	
			$11,620 51
1866.	CR.		
Sept. 15.	By sales 47 bales cotton, - - -		4,924 77
	Balance due F. & H. - - -		$6,695 74

MEMPHIS, TENN., *September 15th*, 1866.

Exhibit No. 8.

Shipped, in good order and condition, by W. H. Feild, (on account and risk of whom it may concern,) on board the good steam-

boat called the E. O. Stanard, whereof Wharton is master for the present voyage, now lying at the port of Little Rock, and bound for Memphis, the following articles, marked and numbered as below, which are to be delivered, without delay, in like good order and condition, at the aforesaid port, (the dangers of the river, fire and unavoidable accidents only excepted,) unto Farrington & Howell, or to his or their assigns, he or they paying freight for said goods, at the rate of $2.75 per bale, and charges.

In witness whereof, the master, clerk, or agent of said boat subscribes to —— bills lading, all of this tenor and date, one of which being accomplished, the others stand void.

Dated at Little Rock this 5th day of Oct., 1865.

Marks.	Articles.	Weight.
W H F	42 bales cotton.	
W H F	3 " do.	
	45	

Privilege lighting and reshipping.

GALL.

Exhibit No. 9.

LITTLE ROCK, *Oct. 6th*, 1865.

Shipped by W. H. Feild, in good order and condition, on board the good steamboat called the Zephyr, whereof De Main is master for the present voyage, now lying at the port of Little Rock, and bound for Memphis, the following packages of articles, which are to be delivered, without delay, in like good order, at the port of Memphis (unavoidable dangers of the river and fire excepted,) unto Farrington & Howell, or their assigns, he or they paying freight, at the rate of three (83) dollars per bale.

In witness whereof, the owner, master, or clerk of said steamboat hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others stand void:

Marks.	Articles.	Weight.
W H F	1 one bale cotton.	
W H F	1 one bale cotton.	
B O B	—	
	2 b. c.	

O. K. BILLY W. GREENE, *Clerk.*

I am a citizen of Memphis, state of Tennessee, and have been for the past two years. Am a cotton factor and commission merchant in said city. I was engaged in that business in October, 1865. I am acquainted with the custom and general rules governing commission merchants in said city. It is the custom of commission merchants, and their duty to do so, to sell cotton or other products placed with them for sale, on arrival, at the best market price, unless otherwise ordered by shipper; but where it is shipped, and the party writes the commission merchant to use his own discretion in selling, he may hold as long as he thinks best, unless other instructions are given. In case where a merchant advances on cotton in store, he has the right to sell whenever the cotton approximates to the amount advanced, and will do so, unless the owner has made a special arrangement to have him hold it. Where a party draws on cotton, it is customary to charge him interest on the advance.

Money was worth in October, 1865, in the city of Memphis, to No. 1 men, 1 per cent. per month, I am acquainted with the house or firm of Farrington & Howell, and regard them as good business men, and stand well.

Cross-examined by plaintiffs:

Where cotton is received, and nearly the worth of it is drawn or received by the owner, and the cotton is to be held for some time, it is usual to charge 2½ per cent. for the advance.

F. M. McLEFRESH.

And thereupon the plaintiffs rested their case.

Mr. Barnes, a witness for defendant, being duly sworn, proved a printed price-current, published in New York, from October 1st, 1865, until September, 1866, showing a gradual decline in cotton

from the 26th October until the time the cotton was sold, as shown by the plaintiffs' witnesses, and particularly prices as follows:

Showing a decline from October 28th, 1865, to December 2, 1865, of about 9 cents.

The difference between the price of cotton in New York and Memphis is from one to two and a half cents where the tax has been paid, the price being higher in New York.

Silas F. Feild, a witness for defendant, swore as follows:

I am a brother of defendant, and the person mentioned as such by Mr. Farrington in his deposition. I called on the plaintiffs at the time stated by Mr. Farrington, and asked to see the cotton shipped by my brother. He told me that he had sold it to Mr. Starke; and having sent for Mr. Starke, the latter said that the cotton had been shipped by him to Boston. I told him that I was going east, and would perhaps be at Boston, and would like to get to see the cotton; and so he gave me the address of his consignee in Boston. I did not go any further than New York, and never saw the cotton afterwards. My object was to see whether other and inferior cotton had not been substituted for that shipped by my brother to Messrs. Farrington & Howell. I did not act as the agent of my brother in this respect, and had no authority from him in the premises. I had heard my brother frequently speak of the matter, and I had suspicions that he had been swindled by the plaintiffs by such a substitution as I have spoken of; and having some leisure time in Memphis, I concluded to look into the business a little. I never told Farrington & Howell, nor any one else, that I was acting as my brother's agent. I had no other interest in this matter than that interest that one has or feels for his brother.

The defendant proved by Mr. Griffith and Mr. Kingsbury that the custom of commission merchants and cotton factors at Memphis is to charge two and a half per cent. for advances made on cotton; and that, where large advances have been made on cotton, and no specific instructions are given as to the time and mode of sale, the commission merchant may, according to custom, sell at any time, and reimburse himself.

William H. Feild, the defendant, being sworn, stated that he shipped the 47 bales of cotton to the plaintiffs on the recommendation of Mr. Tucker, of Little Rock, never having had any business or acquaintance with them before. He placed the cotton in the plaintiffs' hands, with instructions to sell immediately. He then left Memphis, and on getting to Moscow, distant about three hours by rail from Memphis, he saw that cotton was advancing in value, and he sent to the plaintiffs the dispatch mentioned in the deposition of Mr. Farrington, telling them not to sell the cotton until he saw them. On his return to Memphis, which was after an absence of three days, he obtained from the plaintiffs the advance of eleven thousand dollars, and gave them express instructions to sell the cotton within ten days, and to reimburse themselves for the money thus advanced. The plaintiffs undertook to do so, and, as the cotton at the prices then prevailing would have brought some hundreds of dollars over the amount advanced by the plaintiffs, they said that they would charge no commissions for their advance. I then went east, and returned in about fourteen or fifteen days to Memphis, where I only made an hour's stay on my way home to Little Rock, which I occupied in seeing the plaintiffs. Cotton had declined one cent on the pound since I had told them to sell, and I remonstrated with them for not having sold. They excused themselves by saying that they had only been acting for my interest, which excuse I accepted. I, however, renewed my instructions, and the last words I said to Mr. Farrington, on shaking hands with him, were these: "Whatever you do, do not let the cotton fall one cent lower." I heard no more from the plaintiffs until I received their letter of the 16th of November, a copy of which is referred to, and made an exhibit to the deposition of Mr. Farrington. I was then surprised to learn that the cotton had not been sold. I thought the plaintiffs had made themselves liable by their neglect to sell. I was afraid to answer their letter, as I regarded it as a mere endeavor to obtain some admission or concession from me; and I concluded to abandon the matter, leaving them with whatever responsibility they might have incurred. Cotton had fallen in the market very

considerably, and I did not feel disposed to make myself a party to their delinquency. I afterwards received from the plaintiffs the other letters referred to in the deposition of Mr. Farrington, and copies of which are made exhibits to the same. (Here the witness produced the originals in court.) I have never answered either of them, and from the reason which I have stated; nor have I had any further correspondence with the plaintiffs. It was between the 25th and the 28th October, 1865, when I last saw the plaintiffs at Memphis. Had they sold the cotton within ten days after I left, it would have repaid the advance paid me. If sold on the date of their first letter to me, it would not have repaid the advance by a considerable sum; and, from that time until the date of their sale, as reported, the price of cotton gradually declined. In October, 1865, and in November of the same year, cotton was about two cents lower in Memphis than in New York, where the tax had been paid; and the tax had been paid on this cotton.

And this was all the evidence in the case. Thereupon the defendant asked the court to give the following instructions, to wit:

1. If the jury find from the evidence that, after the cotton was placed in the hands of the plaintiffs, Feild gave them instructions to sell before the price should fall any lower, and that the plaintiffs failed to do so, then the plaintiffs must suffer any loss occasioned by reason of their failure to sell at that time, and Feild is entitled to a credit for the amount that the cotton would have brought if sold at the time such instructions were given.

2. If the jury find from the evidence that the cotton was left by defendant in the hands of the plaintiffs to sell without any specific orders as to the time and mode of sale; and that the plaintiffs had made large advances on account of said cotton, then the plaintiffs were bound to sell in the exercise of a sound discretion, at such time and in such mode as the usages of trade might require, and to reimburse themselves for their advances out of the proceeds of the sale, and the defendant could not, by his silence, prevent the plaintiffs from making such sale; and if the jury find from the evidence that the plaintiffs did not exercise a sound dis-

cretion in the premises, and kept the cotton on hand for an unreasonable and improper length of time, then the defendant is entitled to a credit for the amount which it would have brought, if sold in accordance with the usage of trade and the exercise of such discretion.

If the jury find from the evidence that the cotton was shipped by defendant to plaintiffs, as commission merchants, to be sold; and that the plaintiffs wrote to the defendant that, unless other shipments were made them, or the defendant made them remittances in cash, they would sell the cotton, then, on the failure of defendant to write to plaintiffs in reply, the plaintiffs were bound to sell the cotton in a reasonable time; and the defendant is entitled to a credit on the plaintiffs' demand for the amount which the cotton would have brought, if sold within a reasonable time after the failure of the defendant to answer said letter.

And the court refused to give the same, or either of them; and in lieu thereof, instructed the jury:

"That in case they find that defendant gave the plaintiffs instructions orally to sell the cotton before any further fall in the price; and that the plaintiffs failed to do so, but afterwards, on the 16th day of November, 1865, wrote the letter mentioned in the testimony of Mr. Farrington and Mr. Feild of that date; and that Mr. Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant."

The court also charged the jury that, as a general principle, plaintiffs, as factors, were bound to use due diligence, care and skill in the sale of the cotton committed to them for sale; and that it was their duty to obey instructions given them by defendant in regard to a sale.

And to the ruling of the court in refusing to give the instructions asked by the defendant, and in giving the instructions aforesaid on its own motion, the defendant at the time excepted.

It will be seen from the bill of exceptions that no question is

raised outside of the instructions. The bill of exceptions has been so fully set forth, in order that the court might see the whole case as tried, and as presented here, and when this is done, there is almost nothing to argue about.

The first instruction asked for by Feild could not be given, for the reason, if in itself law, it had no application to the case at all. It was at best a mere abstract proposition, with nothing in the facts here to rest upon. If given, its only effect would have been to mislead or confuse the jury; and such instructions the courts never give: *Brooks v. Marbury*, 11 *Wh.*, 78; *Tucker v. Moreland*, 10 *Pet.*, 58; *Caldwell v. United States*, 8 *How.*, 366; *Blackburn v. Crawford*, 3 *Wall.*, 176.

So far from there appearing in the case anything of a positive direction, from the testimony of Feild himself, the acts of his factors (F. & H.) were approved, until he deemed it best to be reticent, which, as will be seen, was the cause of all his woes in this proceeding.

The second instruction is faulty for the same reason, and for the additional one, that all that is presumed in it about selling according to the custom of merchants and usage of trade, in the exercise of a sound discretion, is shown to have been complied with. The testimony is full in establishing the fact that Farrington & Howell acted in this agency fairly, and according to the usage of trade, and not being differently instructed by Feild, there is no foundation for this instruction.

The third instruction asked by Feild is liable to the like objections, and to the further objection that it attempts to shield Feild by his own silence in not replying to the letters of his factors, which cannot be done, as will be seen when the instructions given by the court are considered.

These three instructions were refused by the court, and as the law of the case, the court gave this, "That in case they (the jury) find that defendant gave the plaintiffs instructions orally to sell the cotton before any further fall in the price; and that plaintiffs failed to do so, but afterwards, on the 16th day of November, 1865, wrote the letter mentioned in the testimony of Mr. Farrington

and Feild, of that date, and that Mr. Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant." This was given by the court instead of either or any of those asked for by Feild. And if this be the law, and meets the case, no reversal will be had if even the propositions asked by Feild and refused by the court be law.

The court is not bound to instruct the jury in terms required by either party: it is enough if so much thereof is given, as is applicable to the evidence and the merits of the case; and if the court charge rightly upon the case generally, it is enough, although it does not instruct upon the specific request of counsel; *Clymer v. Dawkins*, 3 *How.*, 674; *Pitts v. Whitman*, 2 *Story*, 609; *Wills v. Smith*, 8 *Wall.* If the charge upon the whole record is correct, this is sufficient; 3 *Graham & Waterman, New Trials*, 768-772, *et seq.*

Then is this instruction or charge sanctioned by the law?

If a consignee inform his principal, by letter, of what he has done, the *silence* of the latter, after a reasonable time, is an approval of it; *Norris v. Cook*, 1 *Curt.*, 464. So when Feild, after a reasonable time, refused to answer the letter of 16th November, 1865, (see page 16 Trans.,) he renounced all further control of the matter, and approved the conduct of F. & H., and left the whole affair to their discretion.

In *Vianna v. Barclay*, 3 *Cowen*, 281, in which there were letters written by the factor to his principal as was the case here, the court held: "Though a factor disregard his instructions, the principal, after advice of this fact, *ought to dissent, and give notice* of his dissent in a reasonable time; otherwise his assent to his factor's act will be presumed."

In *Cairnes v. Bleecker*, 12 *Johns.*, 300, the court ruled, that where an agent, on the 18th July, had informed his principal by letter of what he had done, and the nature and amount of the security he had received, on the delivery of the goods, and the principal

did not answer the letter until 29th October following, he was held to have acquiesced in and approved of the agent's conduct. In this case (12 *Johns.*,) there was a silence of only three months and eleven days, but Feild remained silent on purpose all the while, and considered this his best course; in which he and the law differ—and having chosen this course, his are the burdens resulting from it; *Towle v. Stevenson*, 1 *Johns. Cas.*, 110; *Codwise v. Harker*, 1 *Caines Rep.*, 526; *Armstrong v. Gilchrist*, 2 *Johns. Cas.*, 431.

Brown v. McGran, 14 *Peters*, 479, has many of the features of this case, and the law there expounded by this court supports throughout what we have quoted above, and sustains the instruction given by the court below. The rule is simply this: When the principal is informed of what has been done, he must dissent and give notice in a reasonable time, or his assent to what has been done will be presumed; *Paley on Agency*, (*by Lloyd*) 31; *Prince v. Clark*, 1 *B. & Cress.*, 186; *Bell v. Cunningham*, 3 *Peters*, 69-81; *Courcier v. Ritter*, 4 *Wash. Cir. R.*, 559; *Bredin v. Dubarry*, 14 *Serg. & R.*, 30; *Richmond Manf. Co. v. Starke*, 4 *Mason*, 296.

Marfield v. Goodhue, 3 *Comst.*, 62, resembles to some extent *Brown v. McGran*, and reviews it in some respects, and there is nothing in that case at war with the positions assumed here for F. & H.

Story Agency, *sec.* 258, after considering some of the cases cited here, and others, states the rule to be: "The principal receiving a letter from his agent must answer within a reasonable time, and if he does not, he is considered as admitting the propriety of the acts of his correspondent, and confirms and adopts them."

In *Ousley v. Woolhopter*, 14 *Geo.*, 124, the Supreme Court of Georgia laid down the law thus: "If the agent without authority do an act, and the principal, after a knowledge of the fact, makes no objection, but acquiesces for a length of time, and such acquiescence cannot be explained or accounted for, the law will construe such silence as contrary to the duty of the principal, and hold him bound by it." Feild does not attempt to account for his

silence, only that he was afraid to compromise himself, but the law says he must have repudiated the act, or it is his own act.

In *Crane v. Bedwell et al.*, 25 *Miss.*, 507, the rule was announced briefly but tersely, in this way: "If an agent acts without legal authority, it is the duty of his principal to disown his acts when first informed of them."

In Alabama the same rule has been established by the Supreme Court thus: "When a principal authorizes his agent to obtain an advance of money for him, upon giving a certain security for its repayment, and the latter not being able thus to obtain the money, procures a credit for his principal which answers the purpose for which the money was intended, if the principal upon being informed of what his agent had done, does not object, but acquiesces, he will be bound by the transaction." *Lee v. Fontaine*, 10 *Ala.*, 755.

A like doctrine was held in Maine, in this language: "If a principal does not, in a reasonable time after actual notice of his agent's act, or after notice is to be presumed, disapprove of the conduct of his agent, a presumption of assent will arise." *Johnson v. Wingate*, 29 *Maine*, 404.

The same principle is known and recognized in the civil law. *Emerigon*, (*Meredith*) 116-17; *Pothier Pand.*, *Lib.* 14, *tit.* 6, *n.* 6; *Dig.*, *Lib.* 14, *tit.* 6, 1, 16.

Emerigon, *ub. sup.*, mentions this case which was submitted to him for his opinion: A merchant of Palermo wrote to a house at Marseilles, that he had shipped on board a vessel certain goods to their address, and gave them orders to sell them to the best possible advantage: the ship was long in arriving; the agents at Marsailles effected insurance for account of their correspondent at Palermo, and advised him of their having done so, though they had not received any order from him to that effect: the merchant at Palermo, who, on his side, had not effected any insurance, received their letter, but made no reply to it: at last having learned of the safe arrival of the ship at Marseilles, he alleged that his orders had been exceeded, and that the premium was not a charge

against him. Upon this case *Emerigon* says: "My opinion was, that this pretension was neither *honest* nor *legal.*"

What would he have said as to Feild's pretension here?

He proceeds then to state the general rule: "The principal who makes no reply to the letter in which his agents explain to him what they have done, is supposed to approve their conduct, though they may have exceeded their authority. The reception of such a letter without objection, is among merchants a positive act of approbation—*receptio literarum est actus positivus.*"

There is nothing in this rule of law, as announced in this instruction, and which is sustained by authority, that Feild should complain of, especially as in its application, the jury deducted from the claim of F. & H. over one thousand dollars, when there is no showing at all that they acted in bad faith or were careless, or forgetful of Feild's interests, but on the contrary, when the testimony shows on the part of F. & H. a most complete, conscientious discharge of their duty. F. & H. claimed $6,695.74, and the jury gave them $5,690.24—placing this reduction upon F. & H. from the instruction, which fixes loss on them by reason of the fall of prices from the time F. & H. failed to sell until the failure of Feild to answer their letter. In this Feild got, if not more than he was entitled to, or had any right to expect, certainly every cent that was due him in respect of this transaction. And it is by no means certain that F. & H. might not well complain here, and could have appealed with more propriety than Feild; but they have not, and as Feild is not damaged or is not loser by the judgment, his appeal should avail him nothing. If error was committed, it was not to the injury of Feild, and he cannot urge it for reversal; *Campbell v. Pratt*, 2 *Pet.*, 354; *Raudon v. Tobey*, 11 *How.*, 493; *Thomas v. Lawson*, 21 *How.*, 343; *Deery v. Cray*, 5 *Wall.*, 795.

And in thus assessing this loss upon F. & H., on account of the fall in prices for the time named, all law that can be found at all to benefit Feild was fully satisfied. This is all that can be reached or made out of the cases on this point; *Hardeman v. Ford*, 12 *Geo.*, 205; *Day v. Crawford*, 13 *Geo.*, 508; *Lewin v. Dille*, 17 *Mo.*, 70;

Evans v. Roots, 3 *Seld.*, 186. These four cases, standing somewhat isolated, do not go beyond this damage which the jury found against F. & H., by deducting from their claim over one thousand dollars, and to this end the instruction of the court was all potent.

The court gave another instruction (*Trans.*, *p.* 23,) "that as a general principle, plaintiffs, as factors, were bound to use due diligence, care and skill in the sale of the cotton committed to them for sale; and that it was their duty to obey instructions given them by defendant in regard to a sale." This but announces a proposition lying at the very bottom of the whole law of principal and agent. And certainly it is not a charge to which Feild could object, for it enforced the very idea before the jury which he endeavored to apply, and held up before them a duty which he labored to show F. & H. had neglected. F. & H. might object to it for two reasons: First, it was too general as applied here, and should have been qualified with the doctrine announced in the other instruction as to answering the letter of F. & H. And second, it was calculated to make an impression upon the jury, that F. & H. had failed to obey instructions, when the testimony discloses the fact that they were studious to comply with his (F's.) wishes, and did all that care and diligence could do to satisfy him. So this instruction, like the other, is as favorable to Feild as he could ask, and if there is reason to complain it is for and with F. & H.

We have then the law given approved throughout; the facts were all before the jury, and no questions arising on them at all, the verdict was found, and it injures F. & H. if any one, and not Feild. The truth is if a man may be said to be *lucky*, Feild was in this case—he escaped well indeed, and it should be a matter of congratulation to him, and not complaint.

Really there is as little to urge in favor of a reversal of this judgment, by Feild, as there ever was found in a case before any court; and it does seem to be a fit case in which to apply the rule in this court as to damages at the rate of ten per centum, for

surely this writ must have been sued out for delay merely. *Conkling Tr.*, 749, (*Appendix*, *No.* 23.)

Respectfully,

A. H. GARLAND,

For Defendants in Error.